

Quarterly Report
of the
ATTORNEY GENERAL
of
ALABAMA



For The Period
From January 1, 1963
Through March 31, 1963

VOLUME 110

RICHMOND M. FLOWERS, Attorney General



T. O. "Tillie" Walker

QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

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**TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS
OF ALABAMA:**

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1963 through March 31, 1963, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy or county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

RICHMOND M. FLOWERS
Attorney General

RICHMOND M. FLOWERS
Attorney General

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Deputy Attorney General

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OPINIONS

January 11, 1963

Hon. Carl H. Merrill
County Attorney
Cleburne County
Heflin, Alabama

Counties — Sheriffs — Expenses.

Under the provisions of Act No. 539, General and Local Acts 1949, page 925 (Title 54, Section 27(1), Code of Alabama 1940, Recompiled) counties may at their discretion furnish an automobile for use of the sheriff, unless there is a local law to the contrary.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of November 29, 1962, is as follows:

"The Court of County Commissioners of Cleburne County, Alabama, has, for many years, furnished the Sheriff of Cleburne County with an automobile for his use in connection with the duties of his office and, also, pays \$50.00 per month on the cost of the gasoline required to operate this automobile.

"Because the Sheriff of Cleburne County is on a fee basis, as are most of the County officials of this County, one of the State Examiners has questioned the legality of the Sheriff being furnished an automobile by the County.

"We would greatly appreciate being advised as to whether or not Title 54, Section 27(1), Code of Alabama, covers the above situation and, if not, is the Court of County Commissioners authorized to furnish said automobile and help in defraying the cost of the gasoline used in such automobile?"

My answer to your inquiry is in the affirmative.

In an opinion rendered to Hon. Winston Stewart, Judge of Probate, Coosa County, under date of February 1, 1955 (Quarterly Report of Attorney General, Vol. 78, page 34), the following appears:

"It has been held by this office that a county may properly allow

the sheriff a reasonable amount for the use of his automobile, when used in performing his duties in non-support cases. Biennial Report of Attorney General, 1934-36, page 604. Also, the county may furnish machine guns, gas guns, and ammunition in connection with the performance of his duties as sheriff. Biennial Report of Attorney General 1936-38, page 535. Reasonable expenses of investigation of crime made under the provisions of Title 54, Sections 9 and 10, Code of Alabama 1940, when approved by the authority directing the investigation, have likewise been held to be expenses which the county may pay. Quarterly Report of Attorney General, Vol. 47, page 114.

"This office has also held that a county may furnish radio equipment to be installed in automobiles owned or operated by the sheriff in the regular pursuit of his duties in detecting crime and apprehending criminals. Quarterly Report of Attorney General, Vol. 46, page 59. Likewise the county may furnish the sheriff with a boat; outboard motor, and grapnel for his use in the recovery of drowned bodies in ferreting out crime. Quarterly Report of Attorney General, Vol. 49, page 117. It has also been held by this office that a deputy sheriff is an agent of the sheriff, and a necessary expense for a deputy sheriff would be an expense that the sheriff himself would have necessarily incurred. It was further held that the operation and maintenance of an automobile used by a deputy sheriff is a necessary expense for which the county could pay, within the meaning of the local act there under consideration. Quarterly Report of Attorney General, Vol. 55, page 50.

"These opinions were written prior to passage of Act No. 593, General and Local Acts 1949, page 925, and should be considered along with said Act in formulating an answer to the questions propounded by you. Act No. 593, *supra*, provides as follows:

"Section 1. That the county governing body of each of the several counties of the State may, in its discretion, and upon application of the sheriff of the county, purchase for the use of the sheriff any equipment or supplies and pay for any services performed for the sheriff which are reasonably necessary for the suppression of crime, the apprehension of criminals, or the proper performance of the sheriff's duties.

"Section 2. That the cost of any such purchases or services, upon approval by the county governing body, may be paid out of the general fund of the county.'

"In Quarterly Report of Attorney General, Vol. 20, page 104, the following was stated.

"... The word "necessary" means convenient, useful, appropriate, suitable, proper, or conducive to end sought, and does not mean absolutely essential. *Parker v. Pace & Davis*, 82 S. W. (2d) 259, 190 Ark. 950.

"The term "necessary" is not limited to such things as are absolutely indispensable but includes all such things as are proper, useful, and suitable for the purpose. *Garfield County Commissioners v. Isenberg*, 61 P. 1067, 10 Okla. 378.

"In the Century Digest the verb "equip" is defined as meaning "to fit out; furnish with means for the prosecution of a purpose; provided with whatever is needful for efficient action or service"; the noun "equipment" as meaning "anything that is used in the equipping, such as furniture, etc."

"Gasoline and oil furnished drivers of trucks held to be supplies. *West v. Detroit Fidelity and Surety Company*, 118 Neb. 544, 225 N. W. 673, 678.

"Act No. 593, supra, is very broad in its provisions and should be reasonably construed in the light of the purposes for which it was enacted. When so considered, I am of the opinion that each of your questions should be answered in the affirmative; provided, however, that the county may not pay for such gasoline and oil and other equipment and supplies under Act No. 593, supra, in cases where other provisions of the law provide for the payment of same by way of mileage or otherwise."

It can be seen from the quotation hereinabove that this office has authorized counties to purchase many items to be used by the sheriff.

It is to be further noted that many of these opinions were written prior to the adoption of Act No. 539, General and Local Acts (1949), page 925. Undoubtedly the Legislature in the passage of Act No. 539 intended to give the counties wide latitude as to what they could furnish and as to what they could not furnish to the sheriff.

Based on the opinion hereinabove quoted and from the opinions therein cited, you are advised that if the county governing body in its discretion determines that it is reasonably necessary for the suppression of crime, the apprehension of criminals or for the proper performance of the duties of the sheriff, it may furnish him an automobile, unless there is a local law to the contrary. Cf. Quarterly Report of Attorney General, Vol. 107, page 7.

Yours very truly,

MACDONALD GALLION
Attorney General

January 16, 1963

Honorable Carl E. Sellers
Judge of Probate
Houston County
Dothan, Alabama

Filing Tax — Deeds — Mortgages

1. All previous opinions of this office insofar as they conflict in any way with this opinion or with the opinion of this office rendered on September 27, 1961, pertaining to "purchase money mortgages" are hereby expressly overruled.
2. Where vendee purchases property from vendor and borrows all or part of the purchase price from a third party, such mortgage is a "purchase money mortgage," provided the proceeds thereof are applied to the purchase price, and also provided that the deed and mortgage can, under the facts, be considered as part of a simultaneous, or nearly simultaneous, transaction.
3. Refund of deed and/or mortgage privilege tax may be granted under Sections 848 and 849, as amended, Title 51, Code of Alabama 1940, but statutory requirements must be strictly complied with.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion bearing date of July 31, 1962, is as follows:

"With reference to your opinion dated Sept. 27, 1961 addressed to Judge John A. Sankey, Judge of Probate, Montgomery County, entitled: Taxation — Filing Tax — Mortgages.

"You state in your opinion that a mortgage given to a third party to apply on the total purchase price of the property conveyed when the mortgage is filed for record at the same time the deed is filed would be treated as a purchase money mortgage.

"Your official opinion is requested on the following:

"“A” deeds “B” a parcel of land for the consideration of \$10,000.00, there is no indebtedness on the property at the time

"A" signs the deed, at the same time "B" pays "A" \$2,000.00 of his own money, at the same times gives "C" a mortgage for \$8,000.00 to be paid to "A" on the balance of the purchase price. Shall we collect deed tax in the amount of \$2.00 and have placed on the deed documentary stamps in the amount of \$2.20 although there was no indebtedness on the property at the time "A" conveyed the property to "B" and "B" is not assuming any indebtedness but is giving a new mortgage to the third party.'

"We are of the opinion that you stamp **above the indebtedness assumed** on the property at the time conveyed, and pay deed tax on the amount **above any indebtedness assumed** when the mortgage tax has been paid on the mortgage assumed.

"Since we have gone by an opinion dated July 21, 1931, Attorney General Report for 1929-1930 Page 875 and also an opinion dated Feb. 25, 1954 addressed to Hon. J. Albert Logue, Judge of Probate by James R. Payne, Asst. Atty. General, and we have collected the full amount of deed tax on the deeds when the property has been financed by a Firm who's primary business is financing homes and other property, would the property owners be entitled to a refund on the amount of deed tax paid on the deeds they have filed for record under the above conditions, since the date of your opinion dated Sept. 27, 1961?"

It should be stated at the outset that the opinion rendered by this office to Judge John A. Sankey dated September 27, 1961, being the most recent opinion of this office with reference to "purchase money mortgages," supersedes any previous opinions of this office dealing with that subject, and insofar as these previous opinions conflict with the opinion of September 27, 1961, they are hereby expressly overruled.

In the hypothetical set of facts upon which your request was based, it appears that "A" conveys land to "B" for \$10,000.00, \$2,000.00 of which is paid to "A" at the time the deed is signed, the other \$8,000.00 being secured by a mortgage from "A" to "C," executed at the time the deed is given.

Assuming these facts, you would be correct in collecting deed tax in the amount of \$2.00 and mortgage tax in the amount of \$12.00. This would be in line with our previous opinion of September 27, 1961, where it was held that in the case of "Purchase money mortgages" where part of the consideration is paid in cash and the balance secured by a mortgage, mortgage tax should be collected upon the full amount of indebtedness incurred under the mortgage, and deed tax collected upon the value over and above the mortgage. In that opinion, it was

also held that where the mortgage is given to a third party who is not the seller, it may still be considered a "purchase money mortgage."

It is, of course, entirely possible for a mortgage given to a third person for the purpose of securing the balance of the purchase price remaining unpaid, not to be considered a "purchase money mortgage." Where "A" agrees to convey property to "B" for \$10,000.00, and "B" pays "A" \$2,000.00 cash, and agrees to pay "A" the remaining \$8,000.00 at a later date, and "A" in consideration of this payment and promise, signs the deed, and "B" at a later date borrows the money from "C" and gives a mortgage to "C," this would not be considered a "purchase money mortgage" transaction. In the above example the two instruments are not executed simultaneously and as a matter of actual fact, are parts of two entirely separate transactions, the agreement between "A" and "B" being one, and the loan from "C" to "B," the other.

In determining whether any given transaction results in a "purchase money mortgage," the burden would be upon you to determine, first of all, whether the proceeds of the loan from "C" to "B" are being applied on the purchase price, and second, whether the agreement between "A" and "B," is closely enough related in point of time and privity to the loan from "C" to "B." If, from the facts, you conclude that the instrument under consideration is a "purchase money mortgage," you should collect mortgage tax upon the indebtedness recited therein; you may then record the deed upon payment of the deed tax based on the value over and above the mortgage. It should be borne in mind that although the deed and mortgage do not necessarily have to be recorded simultaneously, the facts of the transaction must show that the deed and mortgage were executed as part of a simultaneous, or nearly simultaneous transaction.

With reference to your inquiry as to refunds, it should be stated that no taxpayer is ever entitled as a matter of right to a refund. All refunds are governed strictly by statute, and are a matter of legislative grace. Unless the taxpayer applies for a refund in the proper manner, no refund should be granted. This office has previously held that a refund of deed and/or mortgage privilege tax may be granted under the provisions of Sections 848 and 849, as amended, Title 51, Code of Alabama 1940. Biennial Report of Attorney General, 1930-32, page 1044.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

January 23, 1963

Hon. G. Preston Bryant
Parole and Probation Supervisor
Probation Office
202 Elk's Building
Huntsville, Alabama

Counties — Courts — Pardon, Parole, Probation —
Expenses

1. A county is liable only for claims expressly or by necessary implication authorized by law.

2. Act #421 Reg. Session, 1961 Legislature expressly authorizes Madison County, Alabama to pay the "NECESSARY EXPENSES" of Probation officers.

3. An automobile, oil and gas to operate it and maintenance thereto is a "necessary expense" of a probation officer of Madison County, Alabama for which said county may provide.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

You have requested my opinion in answer to the following question:

"May the county governing body of Madison County, Alabama, furnish to the probation officers of the family court division of the Circuit Court of Madison County, Alabama an automobile, gas, oil and repairs to same."

After a careful examination of the statutes in question, (Act #421, Regular Session, and Act No. 207, Special Session, 1961 Legislature), the Alabama Supreme Court cases and opinions of this office, I am drawn to the conclusion that your question may be answered in the affirmative.

The law in Alabama is well settled that counties are governmental subdivisions of the State, and the county is liable only for those claims that are expressly or by necessary implication authorized by law. **Ensley Motor Car Co. v. O'Rear, Treasurer**, 196 Ala. 481, 71 So. 704; **Ex parte Oscar S. Lewis**, 236 Ala. 82, 181 So. 306.

Act No. 207, *supra*, expressly provides that the county governing

body of Madison County, Alabama must approve the salary paid to the probation officer of the family court. There is no provision in said Act relating to the furnishing of automobiles or other expenses to said officer.

However, Act. No. 421, supra, does provide that the governing body of any county within the population classification (100,000-135,000) may employ probation officers and may fix or pay their salaries or necessary expenses. The 1960 Federal census fixes the population of Madison County, Alabama at 117,348.

Thus, it readily appears that there is an expressed statutory authorization for the payment of claims by the county governing body for salaries or necessary expenses of probation officers in Madison County, Alabama.

The question now to be decided is whether or not an automobile, oil and gas for its operation and necessary repairs thereto fall within the purview of the statutory language "necessary expenses."

It is quite clear to me that an automobile is a necessary requisite of the job the probation officer will be called upon to perform. For example, the probation officer must interview prospective witnesses, juvenile defendants, their parents, relatives, friends, associates, acquaintances and other persons, so that the Court may be fully informed on the matter before it. In order to do this, he must travel over the county and on occasion outside the county. This function certainly presents a need for an automobile. Hence, I conclude that the operation of an automobile by the probation officer of Madison County, Alabama in the performance of his official duties is a "necessary expense" for which the county governing body of Madison County, Alabama may be responsible. Cf. Opinion under date of January 11, 1963 to Hon. Carl H. Merrill, County Attorney, Cleburne County, Alabama.

Therefore, it is my opinion that the county governing body of Madison County, Alabama may furnish to the probation officer of said county in the performance of his official duties, an automobile, oil and gas for its operation, and maintenance thereto.

Yours very truly,

RICHMOND M. FLOWERS,
Attorney General

January 23, 1963

Honorable Les Gilliland
Mayor, City of Gadsden
Gadsden, Alabama

Assessments — Municipalities — Taxation — Taxes.

1. An assessment for municipal public improvements is a tax.
2. A municipality may adjust or compromise an assessment for public improvements only as expressly authorized by the legislature.
3. The City of Gadsden may adjust or compromise a final assessment for public improvements only when those conditions exist which are prescribed by Title 37, Section 540, Code of Alabama 1940.

Opinion by Assistant Attorney General Gish.

Dear Mr. Gilliland:

Your request for an official opinion, bearing date of December 28, 1962, is as follows:

"We would like to request an opinion from the Attorney General concerning public improvement property assessments.

"You will find attached a typical ordinance (marked Exhibit A) whereby the City makes certain improvements such as paving streets, sidewalks, and gutters at the request of property owners, and assessing the cost therefor against the abutting property. The bonds sold by the City of Gadsden are usually for a term of ten years wherein the property owner can make payments on his pro rata share under the public improvement bond issue. Interest is charged at the rate of six percent in the event the assessment is not paid off when the first formal, legal notice is given.

"The public improvements are constructed under a contract bond and guaranteed by the contractor for twelve months, during which period the property owner can file claim under the contractor's bond in the event the work performed is not satisfactory or is defective.

"Now, the legal question I have is this:—

“(1) Can adjustments be legally made in the cost to the property owner in any period of time, or, specifically during the twelve months during which the work is under guarantee by the contractor.

“(2) Can adjustments be legally made by the City Commission from the end of the first year through the tenth year? This adjustment would apply to principal or interest. The requests for adjustments are usually made on the basis that in the opinion of the property owner, the assessment was too high, the paving or other improvement was defective, change of ownership, and other miscellaneous excuses.

“(3) Can adjustments be made on principal or interest after the expiration of the ten-year term of the bond issue wherein there is still an unpaid balance by the property owner?

“(4) Adjustments have been made in the past on both principal and interest for the reasons stated above. It has also been the past practice to adjust accumulated interest on assessments to one-half at the end of the ten-year period. So far as can be determined, there is no legal authority for this procedure except resolution which was passed by the City Commission, a copy of which is attached hereto and marked Exhibit B.

“In order to fully explain exactly the procedure of making an adjustment in the subject public improvement assessments, it amounts to taking funds from the general funds of the City of Gadsden and paying off the portion of the adjustment allowed for the particular property owner for whom the adjustment is made. In other words the property owner to whom an adjustment is made would receive benefits in his behalf that are not being received by the other owners included in the public improvement bond issue, and the funds for such are taken from the general funds and paid on the bond issue to make up the difference.

“There is considerable money involved in adjustments that are now being requested or demanded from the City Commission and we would like to have an opinion at the earliest convenient time. If there is any other material or information which you need to expedite this matter, please don't hesitate to call on us.”

Your purpose will be better served if you have from me a general discussion of the law applicable to the problem presented by your request rather than specific answers to your questions.

As you know a property owner may appeal an assessment for municipal public improvements to the circuit court or court of like

jurisdiction. Title 37, Section 545, Code of Alabama 1940. I assume that your questions refer to instances where the assessments have become final and no appeal therefrom has been taken.

The case of **Smith, Town Clerk v. Hall**, 33 Ala. App. 554, 36 So. 2d 354, held that the power to assess the cost of public improvements against the property improved is embraced in and its exercise is a manifestation of the power of taxation, and the validity of assessment does not depend on any theory of contract.

The Supreme Court of Alabama has held that a municipality cannot grant an exemption of any property from taxation without express authority from the legislature. **Bessemer Laundry Co. v. City of Bessemer**, 215 Ala. 63, 109 So. 104; and **City of Anniston v. Anniston Office Building**, 227 Ala. 180, 149 So. 93.

Title 37, Sections 539 and 540, Code of Alabama 1940; and Act No. 602, Acts of Alabama 1951, page 1039, are the statutes which control the authority of municipalities to adjust or compromise the assessments here concerned. Each of these statutes apply only to municipalities which fall within certain population classifications.

According to the 1960 Federal Decennial Census the City of Gadsden has a population of 55,088.

Section 540, *supra*, which is the statute applicable to the City of Gadsden, reads as follows:

"MUNICIPALITIES OF OVER TWENTY THOUSAND MAY REDUCE OR ABATE ASSESSMENTS IN CERTAIN CASES.—The governing body of any city having a population of twenty thousand or more according to the last or any subsequent federal census shall have power to reduce or abate any assessments heretofore or hereafter made for public improvements in such city in cases where such assessments have been levied or attempted to be levied against property owned by the state of Alabama or by such city or by the county in which such city is located or by any church, hospital or other charitable organization or in any case where the governing body after due inquiry has determined that the assessment on any particular property has been made erroneously or in excess of the benefit derived by such property or so great as to constitute an undue burden upon the property, having in view the value thereof, whether or not such assessment shall have been made final and the time to appeal therefrom expired."

Premises considered, I am of the opinion that the City of Gadsden may adjust or compromise an assessment for public improvements

which has been made final under Title 37, Section 538, Code of Alabama 1940, only when the conditions which are prescribed by Section 540, supra, exist.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

January 30, 1963

Hon. Noble J. Russell
County Attorney
Morgan County Board of Revenue and Control
Decatur, Alabama

Counties — County Supt. of Education — County Boards
of Education

1. Morgan County Board of Revenue may appropriate \$30,000 to Morgan County Board of Education to cover a part of the cost of a building in which the County Superintendent of Education and his staff will be housed.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion bearing date of January 19, 1963, is as follows:

“At the present time the offices of the Morgan County Board of Education are located in the courthouse in Decatur but arrangements have been made by the Board to purchase a building which will be used as an office building for said Board. The building which the Board plans to buy is in Decatur, Alabama, and part of the purchase price will be paid out of funds which the Board of Education will receive from the sale of a parcel of land it now owns in Decatur. The Board of Education has asked the Morgan County Board of Revenue to appropriate \$30,000.00 towards the purchase of the office building. Actually, the space occupied by the Morgan County Board of Education in the Courthouse at the present time is not sufficient for its needs and there is no more available space. Furthermore, the space now occupied by the Board of Education is needed by the governing body for other county purposes.

"Under the above facts your official opinion is respectfully requested as follows:

"1. Can the Morgan County Board of Revenue appropriate \$30,000.00 to the Morgan County Board of Education to be used by said Board, along with other funds, for the purchase of an office building to house its facilities."

It is my opinion that your question should be answered in the affirmative.

Title 52, Section 130, Code of Alabama 1940, as Recompiled 1958 provides, in pertinent part, as follows:

"The county board of revenue or court of county commissioners shall provide the county superintendent of education and his professional and clerical assistants with ample, convenient and comfortable office quarters."

In Biennial Report of the Attorney General, 1928-30, page 113, this office had the following to say: " * * * what office quarters you are to keep at the county seat is exclusively within the province of the county board of revenue or county commissioners' court, * * * ."

In your letter you state that the space in the county courthouse now occupied by the "County board of education" is not adequate for its needs and that the county governing body wants it for other county uses.

It has come to my attention that there is widespread acceptance in educational circles for the use of the terms county board of education, and county superintendent of education interchangeably. Quarterly Report of the Attorney General, Volume 52, page 241. This being so, I will assume that where you used the term county board of education in certain places in your letter, you meant county superintendent of education.

It is apparent from your letter that the county governing body will be required to provide more adequate quarters for the county superintendent and his staff, outside the courthouse.

To do this the county must provide adequate space either in a building presently existing, by erecting a building, by renting space adequate for the needs of said superintendent and his staff, or as suggested in your letter, i.e., appropriating to the county board of education a portion of the cost of erecting a building to house said superintendent and his staff.

This office has held that the county may rent space to house the superintendent and his staff. Quarterly Report of the Attorney General, Volume 1, page 77.

It has also held that the county governing body may purchase land and erect thereon public buildings. Quarterly Report of the Attorney General, Volume 7, page 137.

There being an express mandate on the county governing body of Morgan County, Alabama to provide adequate space for the county school superintendent and his staff, and there being an absence of same in the courthouse or other public buildings, I am of the opinion that the county governing body may appropriate \$30,000 to the Morgan County Board of Education for the erection of a building at the county seat in which to house the county superintendent of education and his staff. The contribution, thus made, will be in lieu of any rental that may be required in order to provide adequate office space for said superintendent and his staff, or space in a building in the county seat that later may be available. Cf. Quarterly Report of the Attorney General, Volume 105, page 14; Quarterly Report of the Attorney General, Volume 76, page 34; Quarterly Report of the Attorney General, Volume 68, page 29.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

February 5, 1963

Honorable James E. Moore
County Attorney
c/o Moore, Simon & Layden
1010 Van Antwerp Building
Mobile 12, Alabama

Counties — Mobile County

1. Pursuant to the provisions of Title 12, Sec. 12, Subsec 22, Code of Alabama 1940, as amended by Act #344, Acts of Legislature 1945, the county governing body of Mobile County, Alabama is authorized to appropriate funds to a civic organization to defray a part of the cost of national television time on the ABC-TV Network advertising the natural and industrial resource potential of said county.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of January 21, 1963, is as follows:

"The County Commission of Mobile County has requested me to ask your opinion regarding authority of the County Commission to appropriate County funds in the amount of \$5,000.00 or more for the purposes hereinafter stated.

"The Mobile Sertoma Club, a Civic Organization, is planning to bring the Professional Bowling Association Tournament to Mobile for one of its nationally televised meets in March of this year. The Club has requested an appropriation from the County Commission to purchase part of the television time available on the show for advertising the industry and other resources of Mobile County. I am attaching a copy of the Club's letter request, with supporting data, for your information and understanding.

"I sought clarification from the writer of the letter as to the details of their arrangement with ABC-TV for the advertising, and I understand from him that the program is sponsored by commercial enterprises (I believe Kent Cigarettes was one sponsor named) and the money which the local Sertoma Club would receive from the County in return for the Air time allotted to advertising the resources of the County would actually be retained by the Club and used for tournament prizes and other tournament expenses. But the County would in return get its advertising.

"There is no question but that Title 12, Section 12(22) of the Code authorizes expenditure by the County to advertise its resources and that such advertising would be accomplished here. However, on two previous and recent occasions, one involving a National Junior Tennis Tournament and the other a PGA Golf Tournament (see opinion of Attorney General dated May 2, 1962), which was sponsored by the same Sertoma Club, your office held the County could not contribute funds to assist in these tournaments. In view of these decisions, the County Commission feels constrained to ask your opinion of the requested contribution in question here in the light of all the circumstances as stated.

"Your early attention and reply will be appreciated in view of the approaching date of the proposed tournament."

Further, attached to your request for an opinion is a letter to Hon. Leroy Stevens, President of the Mobile County Commission, a portion of which is hereinafter quoted:

"The tournament will be carried by the ABC-TV Network and every major market in the United States will carry same. There will be available approximately three minutes on the opening and closing concerning Mobile, including a panoramic shot of the city, etc. Please peruse the enclosed letters from the Mobile Area Chamber of Commerce, the Professional Bowling Association, and from the J. H. Lewis Advertising Agency which pretty well sum up most of the benefits to the city and county of Mobile.

"As pointed out in more detail in the enclosed letters, the three minutes time can be used to sell Mobile and Mobile County nationwide. It is estimated that this advertising would cost approximately \$75,000.00 if purchased. It will be necessary for us to sell this television time for \$10,000.00 in order to be able to stage this tournament. The balance of the money which will be required to be raised by us will be raised by a \$1,000.00 contribution from the Chamber of Commerce, entry fees, ticket sales, program sales and such like."

Title 12, Section 12, Subsection 22, Code of Alabama 1940, as amended by Act #344, Acts of Legislature 1945, provides as follows:

"22. To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. The court is authorized to enter into contracts with any person, firm, corporation or association to carry out the purposes set forth in this subdivision."

It has been held many times by this office that a county governing body may expend funds for the promotional development of the industrial potential of counties in the State of Alabama.

In an opinion of this office under date of September 29, 1951, to the Honorable J. P. Shaffer, Clerk, Montgomery County Board of Revenue, Quarterly Report of Attorney General, Vol. 64, page 82, the following was said:

"I am of the opinion that a chamber of commerce is not in business to make a profit for itself and is not a business enterprise. This organization is concerned with promoting trade and commerce, but an organization derives no profits from increased trade or business even though its individual members may do so.

"Since the opinion rendered June 13, 1944, this office has, on

numerous occasions decided that counties may donate funds to non-profit organizations when a public purpose is involved, without violating Section 94 of the Constitution. When the purpose to be accomplished is of a public nature and is enumerated in our statutes, and particularly Title 12, Section 12, Code of Alabama 1940, as amended, *supra*, as a function of the county or a purpose for which county funds may be expended, we have uniformly held that such expenditures are authorized. This office has held that the county may donate funds to the following: Alabama-Coosa Rivers Improvement Association, Quarterly Report of Attorney General, Vol 55, page 110; Piedmont Livestock Show Barn and Youth Center, Inc., Quarterly Report of Attorney General, Vol. 53, page 185; Cattle Show and Fair Association, which was a nonprofit association, Quarterly Report of Attorney General, Vol. 51, page 151; Artificial Breeding Association, Quarterly Report of Attorney General, Vol. 49, page 86; and to the Cancer Control Program, Quarterly Report of Attorney General, Vol. 47, page 76."

The Honorable Reo Kirkland, Judge of Probate, Escambia County, Alabama, asked this office on October 17, 1956, whether the county governing body could expend funds for the purpose of advertising the county in a magazine entitled "Safety," published by the Sword of the Spirit, Inc. He was told that such would be a legal expenditure of county funds and that the type of magazine in which said advertisement would appear was of no concern.

This office also held in an opinion to Mr. Roe P. Greer, Sylacauga, Alabama under date of December 15, 1960, that he could be employed by the governing body of Talladega County, Alabama, pursuant to their authority as set out in Title 12, Section 12, subsection 22, *supra*, to write articles to be published in newspapers in said county, promoting the industrial and natural resource potential of the county.

Hence, it would appear that a county governing body would be authorized to appropriate funds to a nonprofit organization to cover a portion of the costs of advertising the industrial potential of the county.

However, in two opinions of this office, (Honorable James E. Moore, County Attorney, June 10, 1958 and May 4, 1962) it was decided that funds could not be appropriated to a nonprofit organization for the promotion of a national golf tournament and a national tennis tournament; the incidental benefits of which would have been the advertisement of the natural and industrial resources of the county.

The facts in the two above referred to opinions are, in my opinion, different from those set out in your latest request for an opinion.

To me the distinguishing feature of these facts is that in the two previous opinions, the money was to be appropriated to a civic club to help underwrite the tournaments and pay for the prizes to be awarded to the contestants. Any benefits accruing to the county by way of advertisement would be purely secondary.

In the present request for an opinion, the money is to be appropriated to the civic club to pay a part of the cost of national television time on the ABC-TV Network describing the abundance of natural and industrial resources in Mobile County, Alabama.

In one, the county gives money to a private organization for a private purpose; in the other the county gives money to a private organization for a public purpose, or more specifically, the purpose authorized in Title 12, Section 12, subsection 22, *supra*.

The facts thus distinguished, I am of the opinion that the governing body of Mobile County, Alabama may expend funds to purchase television time to advertise the natural and industrial resources of said county in the expectation that such advertisement will encourage the establishment of plants and factories in such county. Cf. Quarterly Report of Attorney General, Vol. 52, page 74.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

February 8, 1963

Honorable Clarence R. Lawson
Tax Assessor
Hale County Court House
Greensboro, Alabama

Ad Valorem Taxes — Motor Vehicles

1. Under Title 51, Section 704, Code of Alabama 1940, as further amended by Act No. 660 of the 1961 Session of the Legislature, effective October 1, 1961 (Acts, 1961, Vol. I, page 822), ad valorem taxes on motor vehicles are levied for the preceding tax year, and are not due and payable until October 1 at the end of such year.
2. The owner of an automobile brought into Alabama from another state in October, 1962, would not be due to pay ad valorem taxes on such automobile when he

applied for a license tag for this vehicle in this State in October, 1962, as the vehicle was not in this State during the preceding tax year, and a license tag can be lawfully issued for such vehicle upon the owner paying only the license tax and usual fees to the Probate Judge.

3. Ad valorem taxes will be due and payable on such vehicle in Alabama for the first time on October 1, 1963, and then for the ad valorem tax year beginning October 1, 1962, and ending September 30, 1963.

Opinion by Assistant Attorney General Burton.

Dear Sir:

Your request for an official opinion bearing date of January 23, 1963, is as follows:

"It is respectfully requested that you render an opinion under Section 704, Title 51, Code of Alabama, as recompiled 1958, as to whether or not ad valorem taxes are due under the following circumstances:

"A resident of the State of Georgia brought his vehicle into the State of Alabama during October, 1962. This vehicle bore proper license plates for the year 1962 from the State of Georgia. This resident of Georgia has made a permanent move to Hale County, Alabama, during October, 1962, and has applied for license plates. Should taxes be charged for the tax year October 1, 1961, to October 1, 1962? If not, how should the vehicle be assessed so that taxes for October 1, 1962, to October 1, 1963, can be properly collected next Fall?"

The answer to your question is in the negative, and to the effect that no ad valorem tax was due on the automobile to which you refer when the owner applied for a license tag for the vehicle for the first time in Alabama in October, 1962.

Under the expressed provisions of Act No. 660 of the 1961 Session of the Legislature, effective October 1, 1961, and which further amends Title 51, Section 704, Code of Alabama 1940, state and county ad valorem taxes on motor vehicles are to be levied for the preceding year. See official opinion of the Attorney General (M.S.) to Honorable George A. Toulmin, License Commissioner for Mobile County, Alabama, dated August 31, 1962. Under the facts as are related by you this automobile was not in Alabama during the preceding ad valorem tax year, namely, from October 1, 1961 through September 30, 1962. It was not brought into Alabama by the owner from another state

until October, 1962, and after the end of the preceding tax year. Consequently, no ad valorem tax accrued against this automobile during the preceding tax year, and the Tax Assessor was authorized to certify to the Probate Judge that no ad valorem taxes were due for that no ad valorem taxes were due for that tax year, and a license could have been lawfully issued in October, 1962, upon the owner paying only the license tax and usual fees to the Judge of Probate.

Under the circumstances, no ad valorem taxes would be due and payable on this automobile until October 1, 1963, and for the tax year beginning October 1, 1962 and ending September 30, 1963.

You will also note that Act No. 660, supra, provides for the payment of ad valorem taxes on a graduated scale based upon the quarter of the fiscal year during which the car is brought into this state from another state. This automobile was brought into the State in October, 1962, and at the beginning of the tax year, the ad valorem tax should be assessed and collected for four full quarters and the entire fiscal year ending September 30, 1963, when it becomes due and payable on October 1, 1963.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

February 11, 1963

Honorable Stell Benefield
Judge of Probate
Randolph County
Wedowee, Alabama

Filing Tax — Mortgages.

In the case of an open-end mortgage, the provisions of Section 619(b), as amended, Title 51, Code of Alabama 1940, are applicable, and a petition must be presented to the Department of Revenue for a determination of the amount of tax due upon the indebtedness presently incurred; and the Department of Revenue must also require a bond from the owner of the mortgage to secure the State for the payment of any taxes which may become due in the future by reason of subsequently incurred indebtedness.

Opinion by Assistant Attorney General Loeb.

Dear Judge Benefield:

Your request for an official opinion bearing date of January 22, 1963, is as follows:

"Based on the Code Section, Title 51, Section 619, how shall a mortgage be taxed which sets out not only an actual allowance of \$250,000.00, but a commitment on the part of the Mortgagee within six months to advance additional sums aggregating a total of \$850,000.00 (including the advance of \$250,000.00), but giving the Mortgagor an option (but not binding the Mortgagor) to borrow any part of the \$600,000.00? Should the Mortgagee pay a tax upon the entire \$850,000.00 or merely upon the sum of \$250,000.00 and later upon the amounts of such balance as the Mortgagor elects to draw down in accordance with the loan agreement, if and when such amounts are drawn?"

The mortgage described in your request appears to be a type of open-end mortgage, wherein part of the indebtedness (\$250,000.00) is presently incurred, while part has not yet been incurred, and may never be.

Such a mortgage is subject to the provisions of Section 619(b), as amended, Title 51, Code of Alabama 1940, which provides that a petition be directed to the Department of Revenue requesting that it determine the amount of tax to be paid at the time of recordation. See Quarterly Report of Attorney General, Vol. 52, page 246. This tax is, of course, based upon the amount of indebtedness which has been presently incurred under the instrument. Said subsection further provides that the mortgagee submit to said Department of Revenue a bond to secure the payment of any taxes which may become due in the future by reason of the mortgagor incurring additional indebtedness under the terms of the original open-end mortgage.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

February 11, 1963

Mr. Claude D. Kelley
Director of Conservation
Montgomery, Alabama

Probate Judges — License Commissioners — Licenses.

Probate judges, license commissioners are not authorized to appoint or designate sub-agents or individuals to sell Alabama boat registration certificates.

Opinion by Assistant Attorney General O'Rear.

Dear Sir:

Your request for an official opinion dated January 25, 1963, is as follows:

"It has been brought to the attention of this office that many probate judges who have been authorized by the Department of Conservation to issue boat registration certificates have made arrangements with individuals throughout their counties to issue these registration certificates in conjunction with various businesses such as filling stations, hardware stores, etc.

"This procedure by the probate judges has caused considerable confusion and many errors in the Department of Conservation's system of issuing such certificates, mainly because these sub-agents are not properly trained to do such work nor do they have the clerical facilities for handling the issuance of certificates.

"We would appreciate receiving your official opinion as to whether or not the probate judges and license commissioners of this State are authorized under the law to appoint or designate sub-agents or individuals not located in their offices to issue Alabama boat registration certificates."

Your question is answered in the negative.

Your attention is directed to the provisions of Sections 6 and 32 of Act No. 576, Acts of Alabama 1959, which Act created the Water Safety Division and prescribed its duties and authority. I quote as follows the pertinent parts of Sections 6 and 32, which Sections deal specifically with the sale of boat registration certificates:

"Section 6. (1) The Department of Conservation will issue annual certificates of registration directly or may authorize any probate

judge in the State or any other official in the State who is presently authorized to issue automobile license plates, to issue certificates of registration and numbers in connection therewith. In conformity with this Act and any rules and regulations which may be validly issued by the Department of Conservation, the Department of Conservation may assign to each issuing officer in said county a block of numbers and certificates therefor which upon issue the issuing officer shall be allowed a fee of Twenty-five cents (25c) for each certificate issued by him. In counties where the probate judge or issuing officer is on the fee system, the issuing fee shall be retained by the probate judge and in counties where the issuing officer or probate judge is on a salary basis the fee shall be paid to the county treasury . . . ”

“Section 32. The sheriffs of this State may be designated as special agents to sell boat licenses as provided for herein. The Director of Conservation is authorized to appoint other special agents to sell boat licenses as provided for herein; provided, however, the Director of Conservation may not appoint any special agent until said agent is bonded for not less than Five Thousand Dollars (\$5,000.00). Such agents shall receive licenses from the Department of Conservation in the same manner as the probate judges and license commissioners and shall make such reports and be subject to such audits as the Director of Conservation may specify. Special agents so appointed shall make returns to the Department of Conservation in the same manner as probate judges and license commissioners. The Director of Conservation is further authorized to cancel such special agents' authority to sell licenses at any time he may so desire . . . ” (Emphasis supplied)

Sections 6 and 32, *supra*, clearly specify the manner in which boat registration certificates may be sold to the public. The authority for the appointment of special agents is specifically given to the Director of Conservation and not the probate judges and license commissioners of this State.

The appointment of sub-agents by the probate judges or license commissioners is without legal authority. Special agents for the sale of these certificates may only be appointed by the Director of Conservation and then only when properly bonded as specified in Section 32, *supra*.

You are, therefore, advised that the probate judges and license commissioners of the State are not authorized to appoint sub-agents or individuals for the purpose of selling Alabama boat registration certificates.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

February 12, 1963

Hon. Marvin E. Edwards
Mayor, City of Eufaula
Eufaula, Alabama

Municipalities — Planning & Zoning — Zoning.

1. A municipal board of adjustment has jurisdiction of appeals only from decisions of the administrative officers charged with the duty of enforcing the zoning ordinance.
2. A municipal board of adjustment has no jurisdiction of an appeal from the refusal of the municipal governing body to rezone certain property owned by the appellant.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, under date of January 18, 1963, is as follows:

"The following problem has arisen, and I would appreciate your advice thereon:

"In an area of Eufaula, presently zoned R-2, a landowner has requested of the Planning Board that approximately 8.54 acres of his land be rezoned for an industrial use. The Planning Board at a regular meeting voted to recommend the rezoning of this 8.54 acres to the City Council. The City Council has refused to rezone this area and turned down this request. The landowner then appealed to the Board of Adjustment and a meeting has been held and evidence taken before the Board of Adjustment. No ruling has been made by the Board of Adjustment and this Board has asked that I obtain this opinion from you.

"Does the Board of Adjustment have the authority or power to pass upon a question such as this? Can the ruling of the City Council be appealed to the Board of Adjustment or is their authority limited to appeals from the action of an administrative officer, such as the building inspector, or from the ruling of the Planning Board? I would also like to know whether or not the Board of Adjustment has the power to make complete variance in the zoning law such as this would be, or is their power limited to exceptions within the framework of the Zoning Ordinance.

"Your answer to the above would be greatly appreciated, and I

have asked the Board of Adjustment to withhold the ruling until we hear from you."

Your purpose will be better served if you have from me a general discussion of the applicable law rather than answers to your specific questions.

Pursuant to present statutory authorization the Board of Adjustment of the City of Eufaula, Alabama may, within the bounds of the present zoning ordinance of said city, make variances therefrom, which have been appealed thereto by the proper administrative officer or Board, or any aggrieved person, so long as the appropriate conditions exist and proper safeguards are used. See **Nelson v. Donaldson**, 255 Ala. 76, 50 So. 2d 244. Whether a variance should be granted will depend on the facts of each case.

However, should the Planning Commission so depart from the present zoning ordinance, as to amount to a major change in the master plan incorporated in said ordinance, and hence, in effect, a repeal of the ordinance, then the city council or city commission, whichever it may be, shall determine the controversy and there will be no appeal therefrom to the Board of Adjustment.

See **Ball v. Jones**, 272 Ala. 305, 132 So. 2d 120, wherein the court had this to say:

"* * * This court in **Marshall v. City of Mobile**, 250 Ala. 646, 35 So. 2d 553, recognized the well-known rule that municipal authorities act in a legislative capacity in the enactment of zoning ordinances. Also, the amendment to a comprehensive zoning ordinance or a rezoning of a certain area, as was done in the instant case, becomes a part of the existing comprehensive ordinance and, a fortiori, is a legislative act.

* * * * *

"The situation confronting us here is quite different from that provided by Sec. 783, Tit. 37, Code 1940, which provides for an appeal by an aggrieved party to the circuit court with trial de novo from a final judgment of the Board of Zoning Adjustment of towns and cities. This court has very correctly held that the Board of Adjustment performs quasi judicial functions and, therefore, is amenable to judicial review in the circuit court. * * * The situation instantly confronting us is entirely different, since no standard to guide the circuit court on appeal is formulated and indeed none could be formulated, since the circuit court is not, and could not be vested with the power to enact or annul, or over-rule zoning ordinances. * * * "

Therefore, I am of the opinion that the Board of Adjustment of the City of Eufaula has no jurisdiction of the appeal to which your request refers.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

February 18, 1963

Honorable S. K. Adams
Judge of Probate
Dale County Court House
Ozark, Alabama

Licenses—Stores, Cafes, Etc.

1. Under Title 51, Sections 838 and 839, Code of Alabama 1940, a license can be lawfully levied as to each business in which a person engages or even as to each phase or aspect of the same business, without offset or credit where the license schedules so provide.
2. The procurement of the cafe license under Title 51, Section 582, Code of Alabama 1940, does not relieve the cafe operator from also being required to purchase a store license under Title 51, Sections 620, et seq., Code of Alabama 1940, if he sells in the cafe anything other than meals.
3. The fact that the operator of a cafe has procured the cafe license under Section 582, supra, would not relieve him from also having to pay the soft drink license under Title 51, Section 482, Code of Alabama 1940, if he also sells at retail in the cafe soft drinks as are contemplated by Section 482.
4. The operator of a service station who buys the gasoline filling station license under Title 51, Section 531, as amended, Code of Alabama 1940, is also required to purchase a garage license under Title 51, Section 466, Code of Alabama 1940, if he also repairs motor vehicles or engages in any of the other activities described in Section 466, supra.

Opinion by Assistant Attorney General Burton.

Dear Judge Adams:

Your request for an official opinion bearing date of January 26, 1963, is as follows:

"I would like to have an opinion from you on the following:

"1. Does a cafe have to have a \$1.50 store license even though they buy their cafe license?

"2. Does a cafe which serves regular meals and drinks with the meals have to have a drink license even though they have paid for a cafe license?

"3. Does a service station operator who buys a license to operate a gasoline filling station have to buy a garage license?"

Your attention in the first instance is called to Title 51, Sections 838 and 839, Code of Alabama 1940, and also as recompiled in 1958. Section 838, *supra*, provides as follows:

"Where any person, firm or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, **such incorporated company or person shall pay the tax provided by law on each branch of the business.**" (Emphasis supplied)

Section 839, *supra*, covering somewhat the same subject matter, is as follows:

"Wherever in this title two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the legislature **that all such licenses as are herein levied shall be collected without credit or offset**, except where specific provision is made therefor." (Emphasis supplied)

This office, as well as our Supreme Court, has long since established the principle under Sections 838 and 839, *supra*, and their counterparts contained in the 1935 General Revenue Act that where separate and distinct licenses are specifically called for in the license schedules on different activities a license can be lawfully collected for each such specific privilege or activity, even though they arise out of or are related to the same business or occupation; that is, unless the specific license statute or statutes involved expressly provides otherwise. Biennial Report of the Attorney General 1936-1938, page 326, Quarterly Report of the Attorney General, Vol. 16, page 77, Vol. 103, page 24; **Pate v. State**, 243 Ala. 44, 8 So. 2d 516, and **Brown Plumbing Company, Inc. v. McDowell**, 240 Ala. 485, 200 So. 104.

The answer to your first question then depends upon the circumstances. The store license is levied under Title 51, Sections 620, et seq., Code of Alabama 1940. A store is defined in Section 627, supra, as any place where "goods, wares or merchandise are sold, either at retail or wholesale." The store license has been held by this office and also by certain courts in this State **to cover only the privilege of operating a store**, and not to license the sale of any definite article of merchandise, particularly where a specific license is required under the license schedules to sell a particular kind of merchandise. Quarterly Report of the Attorney General, Vol. 103, page 24; **Roy Hudson, et al., v. State, and North Main Service Station v. State**, Nos. 2029 and 2030, In Equity, Circuit Court of Coffee County, Alabama, Enterprise Division.

However, investigation reveals that in the case of the cafe license levied under Title 51, Section 582, Code of Alabama 1940, that the State Department of Revenue has as a matter of long administrative interpretation over the years construed Sections 620 and 627 of Title 51, supra, as not including within the definition and contemplation of what constitutes a store for the purpose of the store license, a cafe or eating house which serves and sells nothing but meals. And while ruling in effect that such a cafe would not be due a store license in addition to the cafe license under Section 582, supra, in a memorandum dated September 3, 1958, to its Field Office at Tuscaloosa, Alabama, the Department was very careful to point out that if a cafe was engaged in selling any article of merchandise, i.e., soft drinks, cigars, or other tobacco products, handkerchiefs, aspirin, etc., in addition to "prepared foods," then the operator of such establishment would be due to pay the store license as well as the cafe license. Moreover, the principle has also been well established that such long prevailing administrative interpretation of a statute is entitled to great weight. **State v. Hobbie Grocery Co.**, 225 Ala. 151, 142 So. 46, 47; **Standard Dredging Corp. v. State**, 271 Ala. 22, 122 So. 2d 280, 285 (Appeal dismissed 364 U.S. 300, 81 S. Ct. 268, 5 L. Ed. 2d 90); **State v. Birmingham Rail & Locomotive Co.**, 259 Ala. 443, 448, 66 So. 2d 884, 889, etc.

In my opinion then, the following would be a safe test to apply in answering your first question. If the cafe or eating house serves and sells only meals, then it would not be due to pay a store license in addition to the cafe license. However, if such place sells in addition to meals any article of merchandise such as candy, cigars, handkerchiefs, etc., then it would be required to purchase both the cafe license and the store license.

In answering your second question, I wish to state that the cafe license under Section 582, supra, covers only the privilege of operating a restaurant, cafe, cafeteria, lunch counter or public eating house. It would not under its provisions excuse a person from also being required to purchase the so-called soft drink license under Title 51,

Section 482, Code of Alabama 1940, if such person also sells at retail soft drinks as are contemplated by that Code Section. The soft drink license is a different one from the cafe license, and covers the separate and distinct privilege of selling soft drinks, as are described in the statute, at retail.

By applying these same principles your third question is also answered accordingly, and to the effect that the purchase of a filling station license under Title 51, Section 531, as amended, Code of Alabama 1940, would not excuse the operator of the filling station from also having to pay the garage license under Title 51, Section 466, Code of Alabama 1940, if he also repairs motor vehicles or engages in any of the other activities described in Section 466, *supra*.

Very truly yours,

RICHMOND FLOWERS
Attorney General

February 19, 1963

Mr. Charles R. Worthen
Administrator
Conecuh County Hospital
P. O. Box 366
Evergreen, Alabama

Conecuh County — Hospitals

The Conecuh County Hospital Association created by virtue of Act No. 211, General Acts 1945, page 330, as amended, is not authorized to purchase real property for the sole purpose of renting it to private individuals for use as office space.

Opinion by Assistant Attorney General Bradley.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1963, is as follows:

"The Board of Directors of the Conecuh County Hospital request an answer to the following question, 'does the Board of Directors

have the authority to purchase land or building to be used as rental property for use such as, office space for doctors?' We have the opportunity of purchasing a doctor's office building adjacent to the present hospital property.

"We are a county hospital, built with Hill-Burton Funds and receiving ad valorem hospital tax."

I am of the opinion your question should be answered in the negative.

I am informed that your hospital was created and exists by virtue of Act No. 211, General Acts of Alabama 1945, page 330, as amended. See opinion of this office to J. H. Robison, Chairman, Executive Committee, Conecuh County Hospital, Evergreen, Alabama under date of October 20, 1960.

Under the provisions of said Act, the Conecuh County Hospital, among other things, has the authority to provide for the construction, reconstruction, improvement, alteration, or repair of any hospital or any part thereof; to take over by purchase, lease or otherwise, any hospital; to lease or rent any land, building, structure or facility needed in the operation of the hospital; to purchase, obtain options upon, acquire by eminent domain, gift, grant, bequest, devise or otherwise, any property, real or personal, or interest therein from any person, firm, corporation, city, county or government; to sell, exchange, transfer, assign or pledge any property, real or personal, or any interest therein to any person, firm, corporation, city, county or government; to own, hold, clear and improve property; to borrow money upon its bonds, notes, warrants, debentures, or other evidences of indebtedness and to secure the same by pledges of its revenues; to make contracts and other instruments necessary or convenient to the exercise of the powers of the association, and to do all things necessary to carry out the powers given in Act No. 211, supra.

Nowhere in this delegation of authority do I find the right granted to said hospital to lease or rent property to private individuals.

In fact, I am convinced that the Legislature did not intend for a hospital association, as herein created, to purchase property for the sole purpose of renting it to private individuals, associations or corporations for use as office space. Quarterly Report of Attorney General, Volume 39, page 17, an opinion to Hon. W. O. Crawford, Chairman, Perry County Hospital Board, Marion, Alabama, under date of January 3, 1958, and an opinion to Hon. Thomas R. Long, Mayor, Town of Uniontown, Alabama, under date of October 19, 1959.

However, I am constrained to point out that my conclusion may

have been different if the facts had been such that the rental or leasing was for the purpose of providing additional facilities for hospital purposes or providing additional revenue for the operation of the existing hospital and related facilities. See an opinion of this office to Hon. Lewis Hamner, Jr., Attorney at Law, Roanoke, Alabama, under date of November 15, 1956.

Hence, it is my opinion that the Conecuh County Hospital may not purchase real property to be rented to private individuals for use as office space.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

February 28, 1963

Miss Sue Heath
City Clerk
Guntersville, Alabama

Municipalities — Schools — County Boards of Education —
Taxation

The City of Guntersville may use part of proceeds of special municipal tax for the needs of the public schools of said city along with Marshall County School Board funds to purchase public school site in the city title to be in said county school board or the State of Alabama and not in the City of Guntersville.

Opinion by Assistant Attorney General Madison

Dear Miss Heath:

Your request for an official opinion bearing date of February 13, 1963, is as follows:

“Please advise us on the following matter:

“On February 19, 1957, the City of Guntersville held a Special Municipal Tax Election to authorize the levy of an additional Ad Valorem Tax of three-fourths of one percentum ($\frac{3}{4}$ of 1%) per

annum. The object of the additional tax was to meet the needs of public schools of the said city. A majority of the votes were cast in favor of the tax. The money has been collected and deposited in an account designated as 'School Tax Fund.'

"A School Building Board was appointed, property purchased and a new school constructed.

"On January 22, 1963, the School Building Board recommended to the City of Guntersville, Alabama, that ten (10) or more acres of property be purchased from the Sorter's estate for the location of a new school, purchase price to be \$17,500.00. The School Building Board had met with the Marshall County School Board and an agreement had been made that Marshall County would pay \$7,500.00 of the purchase price and the balance, \$10,000.00 was to be paid out of the School Tax Fund. The members of the Board of Commissioners voted to concur in the matter.

"Since making the agreement, the Board of Commissioners have been advised that the Marshall County School Board cannot invest the \$7,500.00 unless the deed for the property is made to the County and State School System.

"The Board of Commissioners of the City of Guntersville are now concerned to know if it would be legal for them to invest \$10,000.00 of the City of Guntersville School Tax Fund with the deed to be made to parties other than the City of Guntersville."

It appears that the tax levied by the City of Guntersville was not levied under the provisions of Section 474, Title 37, Code of Alabama 1940, because the pertinent tax was voted upon by the people and the election is mentioned by you as a Special Municipal Tax Election. Section 474, *supra*, deals with authority for a levy to purchase school property, without an election, and the statute provides only for one-fourth of one per cent.

The above is set forth in order to show that the part of **Carey v. City of Haleyville**, 230 Ala. 401, 161 So. 496, which holds that the tax levied under Section 474, *supra*, is upon the supposition that the title to the property should be in the city, is not applicable here.

I do not find that the City of Guntersville has a city board of education, but does, so my records show, have a county board of education.

The wording of the ordinance as to the tax levy is not stated, and I am not informed as to what the ballot contained as to the purposes

for which the tax could be used other than the general statement by you that the tax "was to meet the needs of public schools of the said city."

It is hoped that nothing in the ordinance making the tax levy or upon the ballot used in the tax election will militate against the conclusion here reached. Your desire, however, to have my opinion as soon as possible prompts me to give it without further correspondence relative to the above matters.

The purchase of the ten (10) or more acres for the location of a new school in the City of Guntersville will result in the inhabitants of that city receiving the benefits and enjoying the privileges of this proposed new school in their midst.

The authority of a city relative to matters affecting the health, convenience, and promotion of the general welfare of the inhabitants thereof is of importance also in considering the question presented.

The mere fact that another and independent agency of the state controls school affairs is no reason for a denial of the right of the citizens through their municipal authorities lending aid in support of such institutions. The inhabitants receive the benefits along with others in the territory surrounding.

From the facts before me, I do not believe that title is of controlling importance so long as it is to be in the county and state school systems. **Carey v. City of Haleyville**, supra; **City Board of Education of Athens v. Williams**, 231 Ala. 137, 163 So. 802.

In **State ex rel. Austin v. City of Mobile**, 248 Ala. 467, 28 So. 2d 177, approving the **Carey** case, supra, the court said:

"The holding in **Carey v. City of Haleyville**, supra, was approved in the case of **First Nat'l Bank of Birmingham v. Walker County Board of Education**, 243 Ala. 576, 11 So. 2d 297, 299. In this case the question arose in an action for mandamus whether the Town of Cordova had the right to donate certain funds to the county for the erection and maintenance of a school building in the Town of Cordova, which building and lot had been conveyed to the Walker County Board of Education. The court said, 'the town had the legal right to make the donation without exacting any obligation to return it.'"

In Quarterly Report of Attorney General, Volume 59, page 106, it was ruled that the City of Auburn may contract for the construction of school building facilities to be located on a school site in the city,

the title of which is in the State of Alabama, and the control of which is in the County Board of Education of Lee County. See also Quarterly Report of Attorney General, Volume 100, page 39.

It is my opinion therefore that your question should be answered in the affirmative believing as I do that your request means that title will be taken in the county and state school system, and no obstacles to such use appears in either the ordinance or upon the ballot mentioned herein.

Yours very truly,
RICHMOND M. FLOWERS
Attorney General

February 28, 1963

Mr. Robert L. Fullen
Clerk
Board of Revenue & Control
Chilton County
P. O. Box 557
Clanton, Alabama

Cost and Fees — Counties — Prisons and Prisoners
— Sheriffs.

1. County has no authority to purchase tobacco for prisoners.
2. County may purchase dishwashing compounds and other cleansing agents used to clean county-owned cooking utensils in kitchen located in county jail.

Opinion by Assistant Attorney General Webb.

Dear Sir:

I have received your letter of February 26, 1963, in which you request my opinion as follows:

"It will be appreciated if you would advise me as to whether the county may purchase cigarettes or smoking tobacco for county 'Hard Labor Prisoners' assigned to work details.

"The Sheriff of this county is on fee basis and is refunded by the State a certain amount for each prisoner per day. Please advise me as to whether we may legally purchase dishwashing compounds or other items used in the preparation and/or serving of food to said prisoners."

As to your first question, this office has previously ruled in Quarterly Report of Attorney General, Volume 11, page 146, and in informal opinion to Honorable J. Ed Seymore, dated July 15, 1959, that the county had no authority to furnish tobacco to its prisoners. I find no authority, expressed or implied, to change that ruling.

As to your second question, the Supreme Court of Alabama, in the case of **Holcombe v. Mobile County**, 229 Ala. 77, 155 So. 640, has held that the stipulated amounts provided for, under the provisions of Title 45, Section 145, Code of Alabama, Recompiled 1958, for preparing and serving food of prisoners in county jail includes preparations for its service and, also, such items as fuel for cooking it and excludes the idea of the county expending its funds for this purpose. See, also, Quarterly Report of Attorney General, Volume 14, page 293.

Title 45, Section 184, Code of Alabama, Recompiled 1958, however, provides that the expense incident to the maintenance, healthfulness and hygiene of each county jail shall be paid out of the funds of the county in which such institution is located and, in this regard, this office has previously ruled that the county had authority to purchase soap powder and disinfectants for the maintenance of county-owned property within the jail. Quarterly Report of Attorney General, Volume 53, page 193. This office has also ruled, as has the court, in the **Holcombe** case, *supra*, that the county could purchase a stove and cooking utensils used in preparation of food for prisoners when the kitchen in which said food is prepared is located in the county jail but could not do so if the kitchen was located outside of the jail. See Quarterly Report of Attorney General, Volume 15, page 151.

It is, therefore, my opinion that the county may purchase dishwashing compound and other cleansing agents used to maintain county-owned cooking utensils located in the county jail. It could not, however, purchase any items of this nature for use in a kitchen not located in the jail. In your letter I note that you request my opinion as to "other items" used in preparation of food for prisoners. In view of the above discussion, you can readily see that I cannot answer that question without knowledge of the specific items referred to.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 4, 1963

Honorable J. Gilmer Blackburn
Mayor, City of Decatur
Decatur, Alabama

Contracts — Municipalities

1. A municipality may enter into a contract with a private firm to collect, dispose and destroy garbage.
2. In the collection, disposal and destruction of garbage, a municipality is exercising a governmental function.
3. A municipality may not enter into contracts relating to governmental functions if such contracts extend beyond the terms of office of the municipal governing body and tie the hands of the successor governing body.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of February 26, 1963, is as follows:

"In behalf of the City of Decatur, and all of its officials, officers and employees, your opinion is requested with regard to the following:

"For some years, the City of Decatur has furnished to both its residents and business establishments, garbage pick-up and disposal service. The City now proposes to enter into a contract with a private contractor to perform this service for a three-year period, at a fixed charge to the City, with provision for increase in line with increased service required. The contract is to extend over the three-year period but will contain a cancellation clause should the service performed not come up to the standard required by the contract, and with the further provision that the City may cancel the same at its sole and exclusive option, at any time during the term of the contract provided certain new equipment furnished by the contractor in the performance of the contract is thereafter purchased at a predetermined amount, less a predetermined depreciation for the period of time the equipment is in use. The contract will further contain a clause in substance that the same is subject to the lawful exercise of the police power of the City of Decatur.

"The governing body of the City of Decatur is organized under Article I of Chapter 4, Title 37, 1940 Code of Alabama, with the Commission form of government wherein the members of the Board of Commissioners have staggered three year terms, with none of the terms terminating at the same time.

"The proposed contract will extend almost one year beyond the expiration date of the term of the last of three present Commissioners of the City.

"1. Is the governing body of the City of Decatur empowered to authorize the execution of such a contract for and in behalf of the City of Decatur?

"2. Are the payments required under the contract of the City of Decatur lawful municipal expenditures?"

Title 37, Section 496, Code of Alabama 1940, as amended by Act No. 61, General Acts 1947, page 26, reads as follows:

"Section 496. All cities and towns of this State shall have the power to establish and maintain crematories for the destruction of garbage and like substances, **or to otherwise dispose of garbage**, either within or without the city limits, and to haul or cause to be hauled to such crematories, **or other places of disposal**, trash and garbage of all kinds, and cause the destruction of the same, in such manner as may be deemed expedient by the proper municipal authorities, and to fix and collect such reasonable fee as may be necessary to carry out the provisions of this Section."

Section 496, *supra*, is sufficiently broad to authorize a municipality to enter into a contract with a private firm to collect, dispose and destroy garbage, trash and like substances.

A municipality is exercising a governmental function as distinguished from a proprietary function in the collection, disposal and destruction of garbage, trash and like substances. **City of Tuscaloosa v. Fitts**, 209 Ala. 635, 96 So. 771; and **City of Birmingham v. Scogin**, 269 Ala. 679, 115 So. 2d 505.

In this State a municipal governing body may not enter into contracts relating to government functions if the contracts extend beyond the terms of office of the members of such governing bodies. The hands of successor members of such governing bodies may not be tied by such contracts. **City of Birmingham v. Holt**, 239 Ala. 248, 194 So. 538; and **First National Bank v. City of Jackson**, 236 Ala. 639, 184 So. 338.

Under the facts presented by your request the right to cancel the contemplated contract at any time is reserved to the governing body of the City of Decatur. Therefore, said contemplated contract does not tie the hands of successor members of the governing bodies of the City of Decatur as to the collection, disposal and destruction of garbage, trash and like substances.

Since said successor members of the governing body of the City of Decatur may at any time cancel the contemplated contract to which your request refers, your first question is answered in the affirmative.

Since the City of Decatur is authorized to enter into the contemplated contract here considered your second question is answered in the affirmative.

Very truly yours,

RICHMOND M .FLOWERS
Attorney General

March 6, 1963

Mrs. Berniece H. Centanne
Clerk, City of Prichard
Prichard, Alabama

Municipalities — Words and Phrases.

1. In municipalities having a population of twelve thousand or more, a mayor may veto only ordinances and resolutions of "permanent operation."
2. In such a municipality, a mayor may not veto an action taken by the municipal council which disposes of a particular piece of administrative business.
3. A resolution or ordinance of "permanent operation" constitutes a municipal legislative act.
4. The terms "permanent operation" and "general and permanent nature" are synonymous.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of January 25, 1963, is as follows:

"I have been instructed by the City Council to furnish you the following extracts from the minutes of the City Council of the City of Prichard and request your official opinion as to whether or not the Mayor has veto power over motions made by the City Council.

"The following is an extract from the minutes of a council meeting held January 7, 1963: 'Mr. Red Johnson was present and requested that the City open Owens Street on the right-of-way owned by the City. Mr. Johnson stated that he understood a majority of the Council was willing to go by the Engineer's stakes. Motion by Councilman Lassiter seconded by Councilman Phillips that Polyengineering be emp'oyed to establish the City's right-of-way for Owens Street up to the cemetery, being that portion of Owens Street lying South of Chessman's Lane and that the Street Department open the street along this right-of-way. Motion carried, Councilman Moulyet voting nay. Councilman Moulyet stated that he was casting a nay vote due to this matter being in litigation.' 'The following is an extract from the minutes of a meeting of the City Council held January 21, 1963: 'Correspondence was read to the Council from Mayor V. O. Capps as follows:

" 'January 11, 1963

" 'City Council
City of Prichard
Prichard, Alabama

" 'Gentlemen:

" 'I return to you herewith without my approval the action taken by your body on January 7, 1963, authorizing that Polyengineering be employed to establish the City's right-of-way for Owens Street South of Chessman Lane and that the Street Department open the Street according to this right-of-way.

" 'I am vetoing this action due to the following facts: (1) We have many affidavits to establish the fact that this street has been in the present location for more than 20 years. (2) This action would eventually dead-end two streets in this area.

" 'Yours very truly,

V. O. Capps, Mayor /s/
City of Prichard, Alabama'

"Councilman Lassiter stated that the Mayor does not have a veto on motions by the Council.

"The City Attorney ruled that the Mayor has veto power on actions of permanent nature but he didn't know if the action in questions would be termed as of 'permanent nature.' The attorney further explained that the proper procedure, after the reading of a veto, was for the President of the Council to present the following question to the Council: 'Shall the motion adopted by the City Council on January 7, 1963 relative to the surveying and opening of Owens Street be adopted, the Mayor's veto notwithstanding?' Several members of the Council voiced their opinion that the Council does not have to vote inasmuch as the Mayor does not have veto power over motions.

"Motion by Councilman Lassiter and seconded by Councilman Phillips that a copy of the original motion adopted by the City Council on January 7, 1963 be mailed to the Attorney General, along with an extract from these minutes showing the Mayor's veto, and request his official opinion as to whether or not the Mayor has veto power on motions adopted by the Council. Motion carried.

"Council President Moulyet ruled that the Mayor's veto stands because no one voted against it.' "

The population of the City of Prichard, according to the 1960 Federal Decennial Census, is 47,371.

Title 37, Section 457, Code of Alabama 1940, as amended by Section 6 of Act No. 666, Acts of Alabama 1961, page 910, reads as follows:

"457. RESOLUTIONS AND ORDINANCES TRANSMITTED TO AND APPROVED BY THE MAYOR. — In cities having a population of twelve thousand or more, all resolutions or ordinances intended to be of a permanent operation, after having been passed by the council, shall by the clerk, be transmitted, within forty-eight hours after their passage, to the mayor or acting mayor, for his consideration, who, if he shall approve thereof, shall sign and return the same to the clerk, who shall publish them, and such ordinances and resolutions shall thereupon have the force of law; but the council may provide that they shall be effective from approval. An ordinance or resolution may be recalled from the mayor at any time before it has become a law, or has been acted on by him, by a resolution adopted by a majority of the members elected to the council, in regular or special session."

You will note that Section 457, as amended, *supra*, applies only to

ordinances and resolutions of permanent operation. **Pierce v. City of Huntsville**, 185 Ala. 490, 64 So. 301.

In the case of **Newberry v. City of Andalusia**, 257 Ala. 49, 57 So. 2d 629, the Supreme Court of Alabama, cited with approval McQuillin on Municipal Corporations, as follows:

"The appellant contends that the Mortgage and Indenture of Trust and the bonds will not be valid, because the resolution authorizing their issuance was not published. There is no requirement in Act No. 756 that a resolution authorizing the issuance of bonds or a mortgage and indenture of trust be published. The resolution does not come within the requirement of Section 462, Title 37, Code of 1940, that all 'ordinances or regulations * * * of a general or permanent nature' be published. As stated in Vol. 5 McQuillin, Municipal Corporations, 3rd Ed., § 16.77, ordinances of a general and permanent nature are 'those constituting municipal legislative acts.' The resolution here was in the exercise of a ministerial function. . . ."

In order to answer the question presented by your request it is necessary to determine the meaning of the term "permanent operation" as it is used in Section 457, as amended, *supra*.

I am of the opinion that ordinances or resolutions of a municipality which constitute municipal legislative acts are to be considered ordinances or resolutions of a general and permanent nature and of permanent operation. It is apparent that the term "permanent operation" as used in Section 457, as amended, *supra*, is synonymous with the term "general and permanent nature" and applies to ordinances or resolutions constituting legislative acts as distinguished from enactments of a temporary nature providing for the disposal of a particular piece of administrative business.

I am, further, of the opinion that the action taken by the City Council of the City of Prichard on January 7, 1963, to which your request refers, is an enactment of a temporary nature which disposes of an administrative matter. Such action was not a legislative act.

Therefore, you are advised that the Mayor of the City of Prichard was without authority to veto the action of the City Council here considered.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 6, 1963

Hon. Lehman J. Lewis
Supervisor
Bureau of Loans
State Banking Department
C A P I T O L

Banks and Banking — Investigation Fees — Refunds.

Refunds of Investigation Fees under Alabama Small
Loan Act discussed generally.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of February 8, 1963,
is as follows:

"In re: Refund of Small Loan Investigation Fees
Pursuant Decree of Circuit Court
Montgomery County, Alabama, No. 35341

"In a case filed by S. P. Keith against Lehman J. Lewis, Supervisor of
Bureau of Loans of the State of Alabama, a declaratory judgment
was asked concerning the payment of the \$100.00 investigation fee
upon the annual re-licensing of small loan companies under the Ala-
bama Small Loan Act, 1959.

"The Honorable Eugene Carter rendered a decree holding, in effect,
that the investigation fee had to be paid annually.

"The Supreme Court of Alabama on October 18, 1962, reversed and
remanded the case to the Circuit Court with the direction that a
decree be entered accordingly.

"The final decree of the Circuit Court was issued January 30, 1963,
to wit: 'It is further, ORDERED, ADJUDGED AND DECREED that
the charge of \$100.00 as a fee for investigating the application for
renewal of license under the Alabama Small Loan Act of 1959 is
not an annual charge, but may be charged only one time for an
investigation upon the original application for license.'

"According to an audit of these records the total of
such renewal investigation fees for 1960, 1961 and
1962 was\$125,700.00

"Cashiers and Certified checks paid under protest and held in the safe of the Bureau of Loans upon the advice of the Attorney General:

"For the license year 1960-61 \$ 6,800.00

For the license year 1961-62 9,500.00

"All checks submitted for license year 1962-63 and on hand at the time of the Supreme Court decision 36,900.00

"Total checks on hand 53,200.00

"Amount paid to State Treasurer none of which was paid under protest \$72,500.00

"It may be noted that: (1) There is no provision in the Alabama Small Loan Act, 1959, for any refund of license fees or investigation fees. (2) The period for annual renewal of licenses without penalty ends October 31st of each year. The Alabama Supreme Court decision was dated October 18, 1962.

"Now that a final decision has been reached in the case, my questions are:

"1. What procedure is legally necessary to return the checks submitted under protest for renewal fees for 1960-61 (\$6,800.00) and 1961-62 (\$9,500.00)?

"2. Are the checks received (\$36,900.00) for the 1962-63 license year and on hand on the date of the Supreme Court decision, October 18, 1962, to be returned in the same manner as those referred to in question 1?

"3. Are the renewal investigation fees (\$72,500.00) not paid under protest and which were paid to the State Treasurer for license years 1960-61 and 1961-62 subject to the Court ruling?

"We shall be grateful for your opinion in answer to these several questions at an early date."

As to your question No. 1, my opinion is that those checks paid under protest for the years 1960-61 (\$6,800.00) and 1961-62 (\$9,500.00) may be returned to the licensee as such investigation fee has been declared to be one which may be charged only one time.

Section 4 of the Alabama Small Loan Act 1959, provides that licenses are due on October first and delinquent on November first. As to those

licenses issued after October 18, 1962, the investigation fee, paid other than for the first time, should be returned in the same manner as under question No. 1.

My answer to question No. 3 is in the affirmative. However, monies not paid under protest are not subject to refund after once being paid into the treasury. Recovery of such monies could be had through legislation or through timely application to the Board of Adjustment.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

March 6, 1963

Honorable Estes R. Flynt
Judge of Probate
Lauderdale County
Florence, Alabama

Beauty Shops — Probate Judges — Licenses — Statutes

Section 16 of Act No. 78, Acts of Alabama, Special Session 1961, page 1955, relating to license fees under the regulatory provisions of the Alabama Cosmetology Act does not supersede or repeal the provisions of Title 51, Section 473, Code of Alabama 1940, as amended, relating to revenue license fees required to be paid by beauty parlors and beauty parlor colleges.

Opinion by Assistant Attorney General Leslie Hall.

Dear Sir:

I have your letter of February 9, 1963, requesting my opinion as to whether, in view of the licensing provisions of Act No. 78, Acts of Alabama, Special Session 1961, page 1955, commonly known as the Alabama Cosmetology Act, you are required to continue to collect and receive the license fees prescribed by Title 51, Section 473, Code of Alabama 1940, as amended, from "Beauty Parlor Colleges" where said colleges engage in beauty parlor work for which a charge is made or material used is charged therefor.

Act No. 78 is a regulatory statute, and the licensing provisions thereof

are within the police powers of the State to regulate the conduct of professions affecting the health, morals, or welfare of the people of the State.

Title 51, Section 473, Code of Alabama 1940, as amended, is a revenue measure.

What was said in **Nelson v. Brown**, 242 Ala. 515, 7 So. 2d 572, to the effect that: "The provisions of the Act amending the Board of Cosmetology Act are not an amendment of the revenue laws" would be equally applicable to Act No. 78.

Therefore, it is my opinion that since the fees prescribed in Section 16 of Act No. 78 are to be paid to the Board of Cosmetology for the purpose of financing the regulatory functions of that Board, and have no relation to the raising of revenue, it is your duty, as Judge of Probate of Lauderdale County, to continue to collect and receive the license fees prescribed by Title 51, Section 473, Code of Alabama 1940, as amended.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 8, 1963

Honorable V. H. Albright
Mayor, City of Haleyville
Haleyville, Alabama

Municipalities.

A municipality may send its firemen and fire fighting equipment to answer fire calls outside its corporate limits and police jurisdiction without compensation to such municipality.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of February 22, 1963, is as follows:

"At the regular meeting of the Mayor and City Council on February

18, 1963, a motion was unanimously adopted to request your opinion on the fire department answering fire calls outside the city limits without pay.

"The Mayor and members of the Council would appreciate it very much if you will mail the city at your earliest convenience your ruling or opinion as to whether the fire department is allowed to go outside the city limits to fight these fires."

Your question is controlled by Section 1 of Act No. 558, Acts of Alabama 1955, page 1219, which provides that, whenever the necessity arises during any emergency resulting from fire or other public disaster, the firemen of any municipality, together with necessary equipment, may go or be sent beyond the corporate limits and the police jurisdiction of such municipality to any point within the State of Alabama, to assist in meeting such emergency. ,

Said Section 1 also grants the same immunity from tort liability to the municipality and its firemen when acting outside the corporate limits of such municipality as is enjoyed by them within such corporate limits.

Therefore, I am of the opinion that the City of Haleyville may send its firemen and fire fighting equipment to answer fire calls outside its corporate limits and police jurisdiction without compensation to the City.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 8, 1963

Honorable W. Loy Campbell
Attorney at Law
Scottsboro, Alabama

Cost and Fees — Mileage — Sheriffs

1. Sheriff is entitled to ten cents per mile for each summons and complaint served when costs are to be taxed against parties other than county or state.

Opinion by Assistant Attorney General Webb.

Dear Mr. Campbell:

I have received your letter of February 8, 1963, in which you request my opinion as follows:

"A suit was filed in the Equity side of the Circuit Court in Jackson County against several hundred respondents, most of whom lived in one community. The Sheriff served a summons and complaint on these people. He would serve as many as 20 or 30 in one trip and in several instances served two or more at the same house.

"The question is whether or not he is entitled to claim mileage for each summons and complaint served?"

You are aware, of course, that no private questions may be submitted to the Attorney General for answer. Title 55, Section 242, Code of Alabama Recompiled 1958. However, in view of the fact that you are acting as attorney for the former sheriff of Jackson County and that this question has arisen by virtue of the sheriff's duties, I feel that you are entitled to the opinion of this office.

In Quarterly Report of Attorney General, Volume 81, page 54, at page 57, this office held:

"In an opinion of this office under date of June 25, 1951, appearing in Quarterly Report of Attorney General, Vol. 63, page 44, this office held, in construing Act No. 177, General Acts 1947, page 62, that the sheriff was entitled to receive the mileage fee of ten cents per mile in respect to each defendant arrested, even though he arrested two defendants on one trip. Act No. 177, supra, construed in that opinion, provided for a mileage fee in connection with a sheriff's serving of a writ of arrest. In my opinion, the same principle would apply when the sheriff serves two writs of subpoena on the same case at the same time. It is my opinion, therefore, that mileage may be charged in respect to each subpoena served upon a witness in a civil case. See also, letter of this office under date of May 10, 1954, addressed to Hon. John McCutcheon, Sheriff, Morgan County, Decatur, Alabama."

This opinion, of course, was based on Title 11, Section 34, Code of Alabama 1940, prior to the 1956 amendment which specifically removed subpoenas from the mileage fee. However, this opinion is still applicable insofar as the same applies to mileage fees for serving summons and other mesne process other than subpoena. This opinion is based on the ruling previously made by this office in Quarterly Report of Attorney General, Volume 63, page 44. In that opinion, this office held that the sheriff was entitled to receive the mileage in respect to each defendant

served on the reasoning that the mileage was to be taxed against the respective defendants in each individual case, upon conviction and that it was the opinion of this office that it was not the legislative intent that the mileage fee could be charged against one defendant and not charged against others served in separate cases.

In an informal opinion of the Attorney General to Honorable S. Kirke Adams, Judge of Probate, Dale County, dated October 13, 1961, it was held that in eminent domain proceedings in the name of Dale County, Alabama, the sheriff was not entitled to mileage fees for each service of summons where several defendants were served at the same place at the same time. The basis of this ruling was that the cost in each individual case served would be taxed against Dale County and, therefore, a clear distinction arose between this and previous opinions of this office dealing with cost being taxed against separate defendants. It is, therefore, my opinion that the sheriff is entitled to mileage of ten cents for each summons and complaint served regardless of the fact that several defendants may be served at one time in one place if the cost of the cases involved are to be taxed against individuals other than the county or the state.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 11, 1963

Hon. Relfe S. Pruett
Clerk

The County Commission of Russell County
Phenix City, Alabama

County — Depositories — Banks and Banking.
Opinions Overruled, Modified or Distinguished.

1. Under the provisions of Title 12, Section 44, Code of Alabama 1940, a county may designate more than one bank as depository.

2. A contractual relationship exists between a county and a bank which has been designated as county depository. Opinion appearing in Quarterly Report of Attorney General, Vol. 46, page 28, insofar as it conflicts herewith is overruled and withdrawn.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of February 20, 1963, is as follows:

"In November of 1962 the Board of Commissioners of Russell County designated as its depository for the year 1963 the Phenix-Girard Bank, of this City. In January of 1963, the Phenix National Bank opened for business in Phenix City.

"My question is this: Can the Commission now adopt another resolution naming both the Phenix-Girard Bank and the Phenix National Bank as depositories?

"Would you please give us an opinion on this?"

Title 12, Section 44, Code of Alabama 1940, reads as follows:

"§ 44. How depositories selected. — The board of revenue, court of county commissioners or other like governing body shall on or before the first Monday in December of each year select as the county depository, for the placing therein of county funds for the period of the following calendar year, an incorporated state or national bank, or banks in the county, and where permitted by law shall select such bank or banks as offers the highest rate of interest to the county on daily balances of bank deposits."

This section was amended in 1956 by inserting the words "or banks" after the word "bank" as it appears in this section. It thus appears that this amendment would authorize a county to designate more than one bank as its county depository. The opinion appearing in Quarterly Report of Attorney General, Vol. 46, page 28, insofar as it conflicts herewith, is hereby overruled and withdrawn.

It is a well settled rule of law that a contractual relationship exists between a bank that has been declared a county depository and the county. **Limestone County v. Montgomery, Superintendent of Banks**, 226 Ala. 286, 146 So. 607. This being true, Russell County, even though it has authority to designate more than one bank as a county depository, it cannot do so in the instance presented by you without the consent of the Phenix-Girard Bank, its contractee. In other words, if the Phenix-Girard Bank will agree that its contract with the county to act as county depository be altered, then there is no prohibition against designating two banks as county depositories.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

March 11, 1963

Mr. A. J. Honeycutt, Mayor
City of Warrior
Warrior, Alabama

Licenses — Lodgings Tax
Tourist Camps — House Trailers

The so-called lodgings tax levied under the provisions of Title 51, section 629 (1), et seq., Code of Alabama 1940, recompiled 1958, is applicable to accommodations supplied in a trailer court for any period the same may be rented even though house trailers in such trailer courts are set up on a permanent foundation.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion bearing date of February 26, 1963, is as follows:

“Re: Act No. 159, 1962
Act No. 44, 1961

“Please give me a ruling on whether or not lodging tax is applicable to house trailers set up on a permanent foundation in established trailer parks.

“The new law places a property tax, state, county, city and a school tax on trailers. Trailers are also included in Act 248, 1955.”

The so-called lodgings tax is levied by the provisions of Title 51, section 629(1), et seq. Code of Alabama 1940, recompiled 1958, Act No. 248, General Acts 1955, page 586). Section 629(1), supra, provides as follows:

“There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax upon every person, firm, or corporation engaging in the business of renting or furnishing any room or rooms, lodgings, or accommodations to transients in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which rooms, lodgings, or accommodations are regularly furnished to transients for a consideration, in an amount to be determined by the application of the rate of three per cent (3%) of the charge for such room, rooms, lodgings,

or accommodations, including the charge for use or rental of personal property and services furnished in such room. Provided, however, there is exempted from the tax levied under the provisions of this article any rentals or services taxed under the provisions of the Alabama Sales Tax Act, article 10, chapter 20, Title 51, Code of Alabama 1940. The tax shall not apply to rooms, lodgings, or accommodations supplied for a period of thirty continuous days or more in any place other than a trailer court. **The tax shall apply to accommodations supplied in a trailer court for any period the same may be rented.**" (Emphasis supplied)

In view of the last sentence of section 629(1), supra., it is my opinion that the tax levied thereby is applicable to accommodations supplied in a trailer court for any period the same may be rented even though house trailers in such trailer courts are set up on a permanent foundation.

The provisions of Act No. 159, Special Session 1962, page 203, which amends Act No. 44, Special Session 1961, page 1897, referred to in your request, relate to license tags for and ad valorem tax on house trailers and in no way affect or militate against the lodgings tax levied by section 629(1), supra.

Your inquiry is, therefore, answered in the affirmative.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 12, 1963

Honorable John M. Breckenridge
City Attorney
City of Birmingham
Birmingham, Alabama

Funds — Municipalities — Words and Phrases.

1. A municipality which is authorized to use funds derived from a bond issue to construct a high school stadium may use such funds to purchase an existing stadium.

2. The word "construct" has divers meanings and may be synonymous with the word "provide."

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of February 20, 1963, is as follows:

"The Park and Recreation Board of the City of Birmingham (established under the provisions of Sections 721-729, Title 62, Code of Alabama of 1940) has requested that I ask you for an opinion as to the following:

"May the proceeds from the sale of bonds issued under Proposition No. 4, approved by the electorate of the City of Birmingham, Alabama, at the Special Municipal Bond Election held May 3, 1960, be used for the purchase of Rickwood Field, a privately owned and existing athletic field and stadium in the City of Birmingham. In order that you may have an idea of the layout of Rickwood Field, I am enclosing an aerial photo of same which appeared in the February 13th edition of Birmingham News. There is approximately \$350,000 of Bond Funds proceeds available for the construction of a high school stadium under the provisions of Proposition 4 of said Special Municipal Bond Election held May 3, 1960.

"Said Proposition No. 4, as it appeared on the official ballot for said election, was as follows:

"PROPOSITION NO. 4

"Shall bonds of the City of Birmingham be issued in the principal amount of \$975,000 for the purpose of improving park and recreational centers in said city, consisting of the construction of a High School Stadium and additions to the Legion Field Stadium, which bonds shall be secured by the full faith and credit of said city, shall be dated August 1, 1960, shall bear interest from their date until their respective maturities at a rate not to exceed 5% per annum payable semi-annually, and shall mature in the following principal amounts on August 1 in the following years: \$30,000 each year from 1961 to 1971, inclusive; \$40,000 each year from 1972 to 1975, inclusive; \$45,000 in 1976; \$50,000 each year from 1977 to 1983, inclusive; and \$30,000 each year from 1984 to 1986, inclusive?"

The question presented is whether the language of Proposition No. 4 of the Special Municipal Bond Election held on May 3, 1960, is sufficiently broad to allow the City of Birmingham to purchase Rickwood Field for use as a high school stadium, notwithstanding the use of the word "construction" therein.

The word "construction" has divers meanings, depending upon the connection in which it is used. See **First National Bank of Eutaw v. Smith**, 217 Ala. 482, 117 So. 38; **Kinney v. Ehrensperger**, 16 Ala. App. 289, 77 So. 439; **Thomason v. Court of County Commissioners et al**, 184 Ala. 28, 63 So. 87; and **City of Graymount et al v. Stott**, 160 Ala. 570, 49 So. 683.

I have found no case in which the appellate courts of this State have considered the problem presented by your request.

However, the Supreme Court of Washington, in the case of **Seymour v. City of Tacoma et al**, 6 Wash. 138, 32 Pac. 1077, held that the word "construct," as used in a statute authorizing a municipality to construct internal improvements, is synonymous with the word "provide" and that said statute authorizes such municipality to purchase an existing waterworks and electric plant upon approval by the electorate of the issuance of bonds therefor.

In the case of **Ostrander v. City of Salmon**, 20 Idaho 153, 117 Pac. 692, the court stated that a statute which authorizes a municipality to construct and maintain a waterworks implies authority to purchase a waterworks already constructed.

When Proposition No. 4, *supra*, is examined as a whole, it is obvious that said proposition was approved by the electorate in order to allow the City of Birmingham to use funds derived from the bond issue to enlarge Legion Field Stadium and to provide a stadium for the use of high schools.

Premises considered, I am of the opinion that the City of Birmingham may expend proceeds from the sale of the bonds to which your request refers to purchase Rickwood Field for use as a high school stadium.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 13, 1963

Hon. Knox McRae
Sheriff

Morgan County
Decatur, Alabama

Hon. L. D. Wall
Sheriff

Madison County
Huntsville, Alabama

Counties — Sheriffs — Opinions — Overruled, Modified or
Distinguished

Under the provisions of Act No. 593, General and Local Acts 1949, page 925, counties may furnish at their expense equipment, supplies and materials, including motor vehicle gasoline, and other supplies, and materials necessary for the upkeep of motor vehicles used by the sheriff, which they deem reasonably necessary for the proper performance of the sheriff's duties.

Opinion appearing in Quarterly Report of Attorney General, Vol. 78, page 34, is hereby modified.

Opinion by Assistant Attorney General McQueen.

Gentlemen:

Your requests for an official opinion bearing dates of March 1, 1963, and March 5, 1963, respectively, are as follows:

"As Sheriff of Morgan County, I respectfully request your official opinion as to whether or not the County Governing Body of my County can supply gasoline to be consumed in the operation of motor vehicle equipment used by the Sheriff's office in the conduct of official affairs of my office.

"Your attention is specifically invited to Act No. 593, approved September 19, 1949 (1949 Acts, page 925).

"The expense of supplying gasoline in handling the volume of business in this office is of considerable amount and your immediate consideration of this question will be greatly appreciated."

"The Sheriff's Office is particularly concerned at this time with the authority of the Board of County Commissioners with regard to buying certain items and supplying certain materials to the Sheriff.

"Please examine Act No. 593, approved September 19, 1949 (1949 Acts, page 925) and advise whether or not, in your opinion, equipment, supplies and materials, including motor vehicle gasoline and other supplies and materials necessary for the upkeep of the motor vehicles, may be paid for by the county governing body."

Section 1 of Act No. 593, General and Local Acts 1949, page 925, reads as follows:

"Section 1. That the county governing body of each of the several counties of the State may, in its discretion, and upon application of the sheriff of the county, purchase for the use of the sheriff any equipment or supplies and pay for any services performed for the sheriff which are reasonably necessary for the suppression of crime, the apprehension of criminals, or the proper performance of the sheriff's duties."

This office in an opinion appearing in Quarterly Report of Attorney General, Vol. 78, page 34, has answered your questions. However, in that opinion a provision or limitation was placed upon the county governing body. This limitation was as follows:

"... provided, however, that the county may not pay for such gasoline and oil and other equipment and supplies under Act No. 593, supra, in cases where other provisions of the law provide for the payment of same by way of mileage or otherwise."

In my judgment, this opinion places a limitation upon the county governing body that is not contained in Act No. 593. It is evident from this act that the Legislature did not intend to place any limitation upon the county governing body in purchasing supplies for the sheriffs under the provisions thereof, but on the contrary left the question of what supplies to purchase or what supplies not to purchase to the discretion of the county governing body. The Legislature in passing this act recognized the fact that supplies needed and necessary for a sheriff of "A" county would be absolutely needless and unnecessary for the sheriff of "B" county. No attempt is made to spell out what supplies are necessary for the various sheriffs of the State, nor is there any provision contained in the act to the effect that the necessary supplies and equipment for the sheriff may not be purchased thereunder if some other provision of law provides for the payment thereof. In other words, it is the evident legislative intent of this act that any other law or provision for the payment of supplies by way of mileage or otherwise, to the contrary notwithstanding, the county governing body may in its discretion purchase any supplies or equipment that it deems necessary for the suppression of crime, the apprehension of criminals or the proper performance of the duties of the sheriff under the provisions of Act No. 593.

The opinion hereinabove referred to is hereby modified to the extent of eliminating any limitation on the discretion of the county governing body.

It, therefore, follows that all of your questions are answered in the affirmative.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

March 15, 1963

Mrs. Josephine J. Golden
Clerk and Register
Law and Equity Court
Crenshaw County
Luverne, Alabama

Clerks — Magistrates — Warrants of Arrest — Crenshaw County.

1. Statutes requiring the endorsement of a magistrate of the county before the execution of a warrant of arrest issued in another county refer to those magistrates enumerated in Title 15, Section 399, Code of Alabama, Recompiled 1958.
2. The Clerk of the Law and Equity Court of Crenshaw County, not being listed as a magistrate in Title 15, Section 399, *supra*, is not a magistrate with general powers.
3. The Clerk of the Law and Equity Court of Crenshaw County, although not a magistrate with general powers, is specifically authorized by special statute to exercise certain powers of a magistrate, but these powers do not include the power to endorse a warrant of arrest issuing from a court or magistrate outside of the county.

Opinion by Assistant Attorney General Sykes.

Dear Mrs. Golden:

I have your inquiry under date of February 21, 1963, which is as follows:

"I would like to request an opinion on the following:

"Title 15, Section 163 is as follows: A warrant of arrest when issued by a judge of the supreme court, or court of appeals, or circuit court, or by a judge of any court of record, may be executed in any county in the state; but if issued by any other magistrate, it must be executed in the county in which it was issued, unless the defendant is in another county; and when the defendant is in another county, it may be executed therein, on a written indorsement on the warrant by a magistrate of that county signed by him, to the following effect, 'This warrant may be executed in _____county.'

"Title 15, Section 164 is as follows: Any lawful officer, having a warrant of arrest issued by a court which is not a court of record to execute, may pursue the defendant into another county, and, on obtaining an indorsement on the warrant by a magistrate of that county, signed by such magistrate, to the following effect: 'A.B. is authorized to execute this warrant in _____ county,' may summon persons to assist him in making the arrest, and exercise the same authority as in his own county.

"Acts of Alabama, Regular, Special Sessions 1961—Act No. 148 Section 4, page 2091, is as follows: '---The Clerk shall have power and authority: (1) To administer oaths and take acknowledgements and affidavits; (2) To sign and issue all processes issuing out of the court, including warrants, affidavits, summonses, subpoenas, writs, executions, commitments, and releases; (3) To approve bonds in civil and criminal cases; (4) To enter all judgments, orders and decrees of the court; (5) To certify all appeals and transcripts; (6) To exercise all powers and authority which are now or may be hereafter conferred on clerks of the circuit courts.' "My question is—As Clerk of the Law and Equity Court of Crenshaw County, do I have the authority to prepare the indorsement mentioned above in Title 15, Sections 163 and 164, Code of Alabama, 1940, recompiled 1958?

"Is the Judge of the Law and Equity Court of Crenshaw County the only authorized person for this work since there is no longer a Justice of the Peace Court for Criminal Proceedings in Crenshaw County?"

In answer to your first question, it is my opinion that you do not

have the authority to make or execute the endorsement mentioned in Title 15, Sections 163 and 164, *supra*. Of course, you could prepare the endorsement for the signature of a magistrate.

In answer to your second question, you are advised that the Judge of the Law and Equity Court of Crenshaw County, being a magistrate, is authorized to make and execute the endorsement mentioned, and any other magistrate of the county may do so.

Sections 163 and 164, quoted in your inquiry, require the written endorsement on the warrant by a magistrate authorizing the execution of the warrant in a county when that warrant was issued in another county. Of course, if the warrant is issued by certain named magistrates, it may be executed in any county without further endorsement. But here we are speaking of those cases where the above noted statutes require the endorsement by a magistrate of a county different from that in which the warrant was issued.

It is clear that the endorsement when required must be made by a magistrate. Magistrates in Alabama are certain specified officers having certain judicial powers. Magistrates in Alabama are defined and listed. Title 15, Sections 120 and 399, Code of Alabama, Recompiled 1958. These are judges of the appellate and circuit courts and courts of like jurisdiction, judges of probate, judges of county courts, judges of inferior courts, justices of the peace, the mayor or chief officer of an incorporated town or city. Clerks are not named as magistrates.

It is my view, therefore, that Sections 163 and 164, *supra*, requiring the endorsement of a magistrate before a warrant of arrest may be validly executed in a county other than that in which it was issued, refer to those magistrates listed in Section 399, *supra*.

Only those officers in your county who are magistrates having general powers as such by virtue of being designated in Section 399, *supra*, may sign the endorsement. This is not to say that clerks or clerks of inferior court, or for that matter solicitors, have no powers of magistrates simply because clerks and solicitors are not listed in Section 399, *supra*. Clerks and solicitors are not magistrates with general powers, because they are not listed in Section 399, *supra*, but other statutes do give to officers not listed in Section 399, *supra*, certain limited powers normally possessed by magistrates.

Section 4 of Act No. 148, Acts 1961, page 2091, prescribes certain powers of the Clerk of the Law and Equity Court of Crenshaw County. Such clerk by special statute is authorized to administer oaths and affidavits, and "to sign and issue all processes issuing out of the court, including warrants, affidavits, . . . writs, . . ." There-

fore, the Clerk of the Law and Equity Court of Crenshaw County has been given some limited powers as a magistrate. It is to be noted that such clerk is authorized only to sign and issue processes issuing out of the Law and Equity Court of Crenshaw County. The warrants to which you refer in your inquiry do not issue out of the Law and Equity Court of Crenshaw County, but from another court outside of Crenshaw County. It is my view that the authority to endorse a writ of arrest issuing out of another court or from a magistrate outside of the county is not one of those powers described in the special act applying to the Clerk of the Law and Equity Court of Crenshaw County. Since the special act does not authorize the clerk to have the general powers of a magistrate and since the said clerk is not specifically authorized to make the endorsements required by Sections 163 and 164, *supra*, it is my view that the clerk is not authorized to sign such endorsements.

Certain officers, such as clerks and solicitors, may be given specific powers usually exercised by magistrates without that officer becoming a magistrate for all purposes. For example, a solicitor is given authority to take affidavits and issue warrants of arrest under the provisions of Title 13, Section 229(3), Code of Alabama, Recompiled 1958. When performing that specific duty, the solicitor in a limited sense is a magistrate (*Halloman v. State*, 37 Ala. App. 599, 74 So. 2d 612, cert. den. 74 So. 2d 614), but it could certainly not be said that a solicitor is a magistrate for all purposes. The same reasoning would apply to the clerk. The Clerk of the Law and Equity Court of Crenshaw County is not authorized to make such endorsement, because the special act does not authorize the clerk to do so, although the special act does authorize the clerk to exercise the authority of a magistrate in certain other instances.

In answer to your second inquiry, you are advised that the Judge of the Law and Equity Court of Crenshaw County, being the judge of an inferior court, is one of the magistrates listed under Section 399, *supra*. I do not know if he is the only magistrate in the county. Presumably there would be others belonging to those classes specified in Section 399, *supra*.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 18, 1963

Honorable George M. Van Tassel
Mayor, City of Tuscaloosa
Tuscaloosa, Alabama

Agriculture and Industries — Licenses — Municipalities — Taxes.

1. A municipality may not impose a license upon a person for selling nursery stock produced by him.
2. A municipality may impose a license upon one who is engaged in the business of landscape gardening.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of January 30, 1963, is as follows:

"The City of Tuscaloosa imposes a license on any person engaged in the business as a landscape gardener and/or dealer in nursery stock, as follows:

" 'Each person engaged in the business of landscaping or landscape gardening and/or each dealer engaged in the business of selling nursery stock as the term dealer and nursery stock are defined in nursery regulations.....\$50.00

" 'And, in addition, 1/10 of 1% of gross receipts for the year next preceding on all such gross receipts in excess of \$10,000.00.'

"The City has demanded a license under the above section from a concern, based on the following facts. Said concern is presently engaged in the performance of a contract with the University of Alabama, involving the setting out of plants, shrubs, trees, etc. around certain buildings located in the Corporate limits of the City of Tuscaloosa.

"It is our understanding that the University, in this case, has caused maps or plats to be made, showing the location and kind of shrubbery, plants, bushes, trees, etc. to be set out around its buildings. Bid proposals are then taken by the University and the successful bidder is given the contract to furnish and put out the shrubs, flowers, trees, etc. according to the plan. The successful bidder also agrees to replace any of the shrubs, flowers, trees, etc. which die within one growing season.

"The nursery contends that they grow all of the nursery stock, and that they are exempt from municipal license by Section 481 of Title 2, of the Code of 1940, as amended. It is their contention that all of the work done in setting out and replacing the plants, is a part and parcel of 'sale or other disposition of farm products.'

"The City contends that the acts of furnishing the necessary labor and materials, preparing the grounds, mulching and outlining the beds, planting, fertilizing, guying the trees, and replacing if necessary, amounts to engaging in the business in the City of Tuscaloosa of landscape gardening.

"We would not contend for a license if the nursery stock was simply sold and delivered in the City.

"Would you please give us your opinion as to whether or not Section 481 of Title 2 above prohibits the imposition and collection of a license pursuant to ordinance, based on the above facts."

Title 2, Section 481, Code of Alabama 1940, and Title 37, Section 758, Code of Alabama 1940, prohibit a municipality from charging persons any license or fee for the sale or other disposition of nursery stock produced by them. Quarterly Reports of Attorney General, Vol. 98, page 34, and Vol. 29, page 121.

This office held in an opinion reported in Quarterly Report of Attorney General, Vol. 37, page 62, that Section 758, supra, which applies to all farm products, prohibits a municipality from imposing a license for the operation of milk trucks on the streets of the municipality upon a dairy which produces the milk it sells from such trucks. It is stated in said opinion that the use of the streets by those who produce farm products for the purpose of marketing or delivering their products is merely incidental to the sale or other disposition of such products.

However, this office has held that, if a person who sells nursery stock produced by him engages in the business of landscape gardening, he is liable for a municipal license imposed for engaging in such business. Quarterly Report of Attorney General, Vol 29, page 121, supra.

Under the facts presented, I am of the opinion that the firm which is engaged in the performance of the contract to which your request refers is in the business of landscape gardening. I am further of the opinion that a municipality is authorized to impose a license upon such business.

Therefore, you are advised that said firm is liable to the City of

Tuscaloosa for the license imposed upon it by ordinance under the schedule quoted in your request.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 18, 1963

Honorable Peter J. Byrne
Business Administrator
City of Fairhope
Fairhope, Alabama

Municipalities — Planning and Zoning.

1. A municipal planning commission is an administrative agency created by the municipality.
2. A municipal planning commission is authorized to adopt rules for the transaction of its business.
3. Subjects not covered by the notice of a special meeting of a municipal planning commission should not be considered at such meeting without the unanimous consent of the members.
4. Irregular action taken at a special meeting of a municipal planning commission may be validated at a subsequent meeting.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion, under date of February 6, 1963, is as follows:

"This letter is written as a request for a decision from your department relative to a Special meeting of the Planning Commission of the City of Fairhope as established under the Code of Alabama 1940, as amended.

"The question is 'Can the City Planning Commission upon calling a special meeting and notifying all the members of the meeting and of the substance of the meeting, then carry out additional discussion pertinent to other planning matters and make a decision by vote at the same special meeting of matters not mentioned in the call?'"

A municipal planning commission is an administrative agency of the municipality created by the governing body of such municipality under the provisions of Title 37, Chapter 16, Article 3, Code of Alabama 1940. Quarterly Report of Attorney General, Vol. 29, page 52.

Title 37, Section 789, Code of Alabama 1940, provides that a municipal planning commission shall hold at least one regular meeting monthly and grants to such commission the authority to adopt rules for the transaction of its business.

Therefore, the answer to your question depends upon the rules adopted by the Planning Commission of the City of Fairhope.

In the absence of a rule to the contrary, subjects not covered by a notice of a special meeting of said commission should not be considered at such meeting unless the members unanimously consent thereto.

It should here be pointed out that irregular action taken at a special meeting of said commission may be validated by ratification of such action at a subsequent meeting.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 18, 1963

Honorable Arnold D. Debrow
Tax Assessor
Mobile County Court House
Mobile, Alabama

Taxation — Exemptions — Hospitals

1. Exemption of hospital property from ad valorem taxation under Title 51, Section 2, Code of Alabama 1940, discussed generally.

Opinion by Assistant Attorney General Miller.

Dear Sir:

Receipt is acknowledged of your letter dated February 19, 1963 in which you request an opinion of the Attorney General as follows:

"As you are quite aware, the provisions of Section 2B, Title 51, Revenue Code of Alabama 1940, provides in substance as follows: "Hospitals owned by individuals or corporations are entitled to partial exemptions from Ad Valorem tax, provided that they maintain wards and beds for charity patients and further provided that at least 15% of the total business done by such private hospitals is charity.

"I have in hand, an opinion from the Attorney General's office, dated December 21, 1962, which holds in effect, that the essentials for granting the above provided exemption, are as follows:

"a. The institution must be a hospital.

"b. Fifteen per cent of the business of such hospitals must be devoted to the treatment of charity patients.

"Charity in the only accepted definition, and in the sense used above, means hospitalization or medical treatment without charge by the institution administering such hospitalization or treatment. "We have in Mobile County, three hospitals whose construction was financed by public subscriptions and government grants under the Hill-Burton Hospital Act. These hospitals purport to be and include in their articles of incorporation, the provisions that they are charitable, educational and scientific non-profit institutions. They have in the past, claimed exemption from Ad Valorem tax on the basis of their articles of incorporation and under the Constitution of the State of Alabama, which grants such an exemption

to institutions meeting the requirements for which these hospitals were formed, and under which, they were incorporated.

"Since the Ad Valorem tax is a tax administered by the tax assessor's office, and the exemptions therefrom are in most instances within the province of his responsibility, I, as tax assessor for Mobile County, have requested proof from the above mentioned institutions, that they are currently meeting the requirements of the law, under which they are claiming the exemption.

"Specifically, I am inquiring as to whether or not these hospitals are performing a reasonable amount of charity to entitle them to the exemption which they claim. The information which I have requested is as follows:

"1. The total amount of business done by your hospital for the tax year beginning October 1, 1961 and ending September 30, 1962.

"2. The amount of charity expressed in terms of dollars and cents (excluding bad debts) that was performed by your hospital for the same period of time.

"3. The names and addresses of the patients who received such benefits as described above.

"An Attorney General's opinion given to the Honorable Bert E. Thomas, my predecessor, by the Honorable Si Garrett, the then incumbent Attorney General, dated March 30, 1951, says in effect that, hospitals or associations organized exclusively for charitable, scientific and educational purposes as a non-profit institution are entitled to exemption from Ad Valorem tax so long as they meet the requirements set out by law granting such exemptions. No place in this opinion does Mr. Garrett exclude any of the requirements such as charity, scientific or educational and no where does he place a greater emphasis on any single requirement than on the other two. Therefore, in view of the fact that these hospitals are incorporated as charitable, scientific and educational, I can only assume that each requirement, including that of charity, carries equal weight in the granting of exemptions and is essential to meeting the overall requirements by the institutions concerned.

"The opinion further holds, that the Mobile Infirmary Association, when used exclusively for the purpose for which it was incorporated, is and was exempt from Ad Valorem taxation. Once again, Mr. Garrett in so holding did not place any less emphasis on the charity requirements than on the educational and scientific requirements.

"My question to you is specifically as follows:

"Is charity in the accepted sense of the word, an essential requirement for the granting of exemptions from Ad Valorem tax to the hospitals mentioned above?"

An exemption from ad valorem taxation was established in Article 4, Section 91, Constitution of 1901 which states:

"The legislature shall not tax the property, real or personal, of the state, counties or other municipal corporations, or cemeteries; nor lots in incorporated cities or towns, or within one mile of any city or town to the extent of one acre; nor lots one mile or more distance from such cities or towns, to the extent of five acres, with the buildings thereon, when same are used exclusively **for religious worship, for schools, or for purposes purely charitable.**" (Emphasis supplied)

The legislature has the power to exempt from taxation unless restricted by the express or implied provisions of the Constitution. The Supreme Court of Alabama in the case of **State v. Alabama Educational Foundation**, 231 Ala. 11, 163 So. 527, 530 ruled:

"Section 91 is not in connection with any specific subject of taxation, to which it is an exception. It is not so expressed as to show a purpose to prohibit the Legislature from granting other exemptions to religious, educational, and charitable institutions. We do not think that such is its intent."

Title 51, § 2(a), Code of Alabama 1940, restated the constitutional exemption contained in Section 91, *supra*, in the following manner:

"The following property and persons shall be exempt from ad valorem taxation and none other: (a) . . . all property, real and personal, used exclusively **for religious worship, for schools or for purposes purely charitable**; . . . are exempt from taxation." (Emphasis supplied)

Title 51, § 2(d), Code of Alabama 1940, grants an exemption from ad valorem taxation on all property of literary and **scientific institutions** and literary societies, when employed or used in the regular business of such institutions. Quarterly Report of Attorney General, Volume 35, page 65.

Your letter refers to these hospitals in Mobile County whose articles of incorporation provide that said hospitals are incorporated for charitable, educational and scientific purposes. If the said hospital properties are used exclusively for charitable purposes, they are exempt from ad valorem taxation under Title 51, § 2(a), *supra*, Quarterly

Report of Attorney General, Volume 62, page 74; if the hospital properties are used exclusively for school purposes, they are exempt from ad valorem taxation under Title 51, § 2(a), supra, Quarterly Report of the Attorney General, Volume 62, page 74; or if the hospital properties are properties of a scientific institution employed or used in the regular business thereof, they are exempt from ad valorem taxation under Title 51, § 2(d), supra, Quarterly Report of the Attorney General, Volume 35, page 65.

Whether the hospital properties are used exclusively for educational or charitable purposes or are property of a scientific institution employed or used in the regular business thereof, is a question of fact for your determination. The exemption vel non is based upon the determination of the question of fact in each individual case. The exemption is determined by the manner the property in question is actually used, and not merely the purposes of the corporation as set forth in the articles of incorporation. **Anniston City Land Company v. State**, 160 Ala. 253, 48 So. 659; **State et al. v. Church of Advent**, 208 Ala. 632, 95 So. 3; **Gay et al. v. State**, 228 Ala. 253, 153 So. 767; **State v. Alabama Educational Foundation**, supra.

Title 51, § 2(b)(1), Code of Alabama 1940, states:

"2. The following property and persons shall be exempt from ad valorem taxation and none other: (b)(1) All property, real or personal used exclusively for hospital purposes, to the amount of seventy-five thousand dollars, where such hospitals maintain wards for charity patients, or give treatment to such patients, provided that the treatment of charity patients constitutes at least fifteen percent of the business of such hospitals . . ."

The requirements to come within the exemption provided for in

Title 51, § 2(b)(1), supra, are:

(1) The property must be used exclusively for general hospital purposes.

(2) At least fifteen percent of the business of such hospital must be devoted to the treatment of charity patients.

Article 1, Rev. Acts of 1935 has been amended and codified in Title 51, § 2(b)(1), supra. The original act was interpreted in the case of **Gay et al. v. State**, supra, and Biennial Report of Attorney General, 1936-1938, page 480. The Attorney General wrote:

"This provision applies to all property used exclusively for hospital purposes, to the amount of twenty thousand dollars (now

seventy-five thousand dollars), regardless of the charitable or commercial purpose of the proprietor or institution, provided 'the treatment of charity patients constitutes at least 15% of the business of such hospital irrespective of the fact that separate rooms, departments or wards were or were not maintained.' Gay et al. v. State et al., 153 So. 767, 228 Ala. 253. It was the evident intent of the legislature to exempt all property used exclusively for hospitals under the proviso fixed, irrespective of the primary purpose being charitable or for gain or profit, as an exemption in addition to that provided in the Constitution to charitable uses."

It appears from the foregoing opinion that it is unnecessary for a hospital to be exclusively a charity hospital to qualify for an exemption under Title 51, § 2(b)(1), supra. It is sufficient to qualify for the exemption if the treatment of charity patients constitutes at least fifteen percent of the business of such hospitals. Whether or not at least fifteen percent of the business of said hospitals is for the treatment of charity patients is a question of fact for your determination.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 19, 1963

Hon. Wilson Ballard
Mayor
Town of Hanceville
Hanceville, Alabama

Municipalities — Electric Membership Corporation —
Officers and Offices.

1. An officer of a municipality who is also an officer and trustee (director) of an electric cooperative which possesses a franchise to use the city streets of a municipality is not in violation of Title 37, Section 413, Code of Alabama 1940, unless he is in addition thereto otherwise working for the cooperative.

2. Letter opinion to you under date of August 29, 1962, and supplemental letter opinion under date of September 21, 1962, are hereby expressly overruled and withdrawn.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Mr. Jesse M. Williams, Jr., attorney for the Alabama Rural Electric Association of Cooperatives and the Alabama Electric Cooperative, Inc., on your behalf, has requested that I reconsider the opinion rendered to you under date of August 29, 1962, which said opinion was supplemented by a letter to you under date of September 21, 1962. The question presented in those opinions and the question which I will consider here is as follows:

"Is a trustee (director) and officer of an electric cooperative organized under Title 18, Chapter 3, Code of Alabama 1940, acting in his capacity as such officer and trustee, and who is also an officer of a municipality, from which the cooperative holds a franchise involving the use of the streets of the municipality, in violation of Title 37, Section 413, Code of Alabama 1940, as amended, by holding both offices?"

My answer to your inquiry is in the negative.

Title 37, Section 413, Code of Alabama 1940, reads, in part, as follows:

"No officer of any municipality shall, during his term of office, be employed, professionally or otherwise, by any corporation holding or operating a franchise granted by the city or the state involving the use of the streets of the municipality . . ."

A cooperative organized under Chapter 3, Title 18, Code of Alabama 1940, is a corporation. Therefore, the question to be determined is narrowed to whether or not a trustee and officer of the cooperative is an employee of the cooperative.

Title 18, Section 39, Code of Alabama 1940, concerning trustees of an electric cooperative reads, in part, as follows:

"The business and affairs of a cooperative shall be managed by a board of not less than five trustees, each of whom shall be a member of the cooperative or of another cooperative which shall be a member thereof. The by-laws shall prescribe the number of trustees, their qualifications, other than those provided for in this chapter, the manner of holding meetings of the board of trustees, and of the election of successors to trustees who shall resign, die, or otherwise be incapable of acting. The by-laws may also provide for the removal of trustees from office and for the election of their successors. Without approval of the members, trustees shall not receive any salaries for their services as trustees

and, except in emergencies, shall not be employed by the cooperative in any capacity involving compensation. The by-laws may, however, provide that a fixed fee and expenses of attendance, if any, may be allowed to each trustee for attendance at each meeting of the board of trustees . . ." (Emphasis supplied.)

There have been a number of cases decided in connection with the Federal Social Security Act where the word "employee" has been defined. There are two lines of cases, as pointed out in *U. S. v. Bernstein*, 179 F. 2d 105. One line holds that the term "employee" includes officers of a corporation and the other line holds that an officer of a corporation is not necessarily an employee. It should be noted, however, that the act itself declared officers of corporations to be employees in order that they might receive the benefits of the act rather than to be eliminated therefrom because of their status as officers. In spite of this statutory declaration, numerous cases have held that under this act an officer of a corporation is not necessarily an employee. In the above cited case, the officers of the corporation received no salary and only gave nominal attention to matters pertaining to corporate organization, such as, attending stockholders and directors meetings and signing stock certificates and checks of the corporation. The Court stated as follows:

"On these facts it is clear enough that no one of the officers was an employee of the corporation in the ordinary understanding of that word or when tested by the common-law incidents of the relationship of employer and employee. While this point is not conceded by appellant's counsel, its correctness was not seriously challenged in the oral argument. It is amply legally supported. Such minor services as the officers performed were only those performed by virtue of their offices pursuant to the maintenance of the corporate organization as distinct from conduct of business by the corporation. In *Shriver v. Carlin & Fulton Co.*, 155 Md. 51, 58, 141 A. 434, 438, 58 A.L.R. 767, the applicable law is succinctly expressed: 'It is true that a director nor any other officer of a corporation is by virtue of his office its employee, but there seems to be no valid reason why his occupancy of such office should disqualify him from serving the corporation in some other and different capacity, or from becoming its employee, where the duties and incidents of his employment are separate and distinct from those pertaining to his office.' See also *Independent Petroleum Corp. v. Fly*, 5 Cir., 141 F. 2d 189, 191, 152 A.L.R. 928; and *National Wooden Box Ass'n. v. United States*, 59 F. Supp. 118, 121, 103 Ct. Cl. 595 (a case on very similar facts)."

The statements in this case very clearly show a distinction between an officer and director of a corporation, acting in his capacity as officer or director in corporate matters, and an officer or director who,

in addition thereto carries on the business in which the corporation is engaged, such as, in the case of electric cooperatives, a lineman, a truck driver, a manager or a bookkeeper.

For a person to be an employee of a corporation, the corporation must have entered into a contract of employment with him, oral or written, and have the right to direct the services he performs. It must have the right to hire or fire him, and pay him a salary or wages for the services he performs.

In the case of an electric cooperative, each cooperative employs a manager, who is the active agent conducting the business affairs of the cooperative under the direction of the officers and board of trustees or directors. He, of course, is an employee and is paid a salary. As stated in Section 39 of Title 18, Code of Alabama 1940, the trustees of an electric cooperative are prevented from receiving salaries as such, but are allowed a fixed fee and expenses for attendance at corporate meetings.

The fixed fee and expenses received by a trustee cannot be considered a salary or wages in the sense of payment for services rendered. Such fees for attendance of corporate meetings are allowed municipal officers under Article 9, Title 37, Section 402(52), Code of Alabama 1940, where they are members of the governing boards of gas districts, and also under Article 8, Title 37, Section 402(30), Code of Alabama 1940, where they serve as water and sewer commissioners.

Attention is directed to a very apt statement in the case of **McClayton v. W. B. Cassell Co.**, 66 F. Supp. 165, 173, where the plaintiff sought reinstatement as an employee under the Selective Service Act, when he had been an active officer of a corporation and received a salary therefrom.

"An officer of a corporation is not, at least in the ordinary sense, an employe of a corporation. This distinction between the two words, officer and employe, has been clearly stated by the Maryland Court of Appeals in *Shriver v Carlin & Fulton Co.*, 155 Md. 51, 58; 141 A. 434, 58 A.L.R. 767. As appears from that case, an officer may also be an employe but only where the facts show that in addition to his status as an officer he has also been employed in a separate capacity for particular purposes. In the instant case there was no contract either oral or written for employment of the petitioner by the respondent. His only duties were prescribed by the by-laws of the corporation, and his salary was fixed by the directors. It is true that as a matter of custom, as in most ordinary business corporations, the active conduct of the business is carried on by the officers, and it is their diligence, industry and success in so doing that causes their election

and reelection from time to time by the directors as officers. Here again, however, it is not intended to put too much stress upon the verbal distinction between an officer of a corporation and an employee; nor upon the consideration advanced by counsel for the respondent that the officer is elected by the directors and an employee is merely appointed by the officers. Conceivably there may be cases arising in which in substance, as evidenced either by written or oral contracts of employment, a person nominally an officer is really an employee of the corporation, and so entitled to the protection of the statute."

In the case of **Independent Petroleum Corp. v. Fly**, 141 F. 2d 189, 191, Judge Sibley of the Fifth Circuit where the case involved the Social Security Tax statute, made the following statement:

"We think Congress took pains not to say 'employee,' but if the definition at the end of the Act is to be forced into Title IX we would still think that the words "Employee" includes an officer of a corporation' do not necessarily mean that all officers of a corporation are employees, but only such as work for it in fact. The Social Security Act as a whole had in contemplation the various Acts on the subject in the States. Some of these Acts have used the term 'employee,' and the question has been raised whether an officer of a corporation was entitled to employee benefits. In common speech the officers and employees are different classes. It has been held that an officer as such is generally not to be considered an employee, but if he actually works for the corporation his being an officer will not prevent his being an employee also."

There are numerous cases that make the same distinction holding that an officer or director of a corporation is not per se an employee of the corporation and unless there is a contract of employment and a salary or compensation paid for the performance of services, other than ordinary corporate services such as attending meetings of Boards of Directors for the purpose of forming policy, and other maintenance of the corporate organization, the relationship of employer and employee does not exist. In the case of a trustee or officer of an electric co-operative, the corporation does not hire or fire the officer or director. He is elected and as such holds his office for a term, subject to possible malfeasance in office. Such a person cannot be considered employed by the corporation when he performs duties only incidental to his office, none of which are related to the conduct of the business in which the corporation is engaged.

It is consistent with the intention of the Legislature of Alabama to allow a mayor or alderman of a municipality to become an officer of a corporation which conducts a business under a franchise with

the municipality, so long as he does not become employed by the corporation in the conduct of the actual business that is being done by the corporation, as distinguished from the duties ordinarily carried out by a director or officer in laying down the policies and performing the other corporate duties of a director or officer. Article 9, Title 37, Section 402(52), Code of Alabama 1940; Article 8, Title 37, Section 402(30), Code of Alabama 1940.

In my opinion, an officer of a municipality who is also an officer and trustee (director) of an electric cooperative which possesses a franchise to use the city streets of said municipality is not in violation of Title 37, Section 413, Code of Alabama 1940, unless he is in addition thereto otherwise working for the cooperative.

The opinion addressed to you under date of August 29, 1962, and supplemented by an opinion to you under date of September 21, 1962, which said opinions reached a different conclusion than that hereinabove expressed, are hereby overruled and withdrawn.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

Honorable Leland Enzor
Judge of Probate
Covington County
Andalusia, Alabama

March 25, 1963

Insane Persons — Arrests.

Where a person has been found in need of care and treatment for his own or others' welfare as provided in Title 45, Sections 205, 208, and 210, Code of Alabama 1940, the Judge of Probate who made the investigation, upon reasonable proof, is authorized to issue a mittimus to the sheriff to take into custody such person and transport him to an Alabama state hospital, even against the wishes of relatives.

Opinion by Assistant Attorney General Hall.

Dear Judge Enzor:

I have your letter of March 4, 1963 in which you ask the following question:

"Does the Judge of Probate have the authority to send the Sheriff into a man's house to take his wife who is mentally ill, and in need of care and treatment, and send her to the State Mental hospital against the wishes of the husband, children, or brothers and sisters?"

Your attention is invited to the provisions of Title 15, Section 432, Code of Alabama 1940, which reads as follows:

"Arrest of insane persons or maniacs.—Any insane person who is at large and not under the control, restraint, or management of any person may be taken into custody or arrested by any officer or person and carried immediately to the probate judge of the county, who shall issue a mittimus or commitment of such insane person either to the county jail or the Alabama state hospitals until inquisition proceedings may be had as to such person so confined. Thereafter the person so confined shall abide by the decree or order of the inquisition proceedings. When such person is brought before the probate judge, if the judge shall be satisfied that the person brought before him is not insane, he may direct the discharge of such person from custody and arrest and decline to institute the proceedings of lunacy. But if the judge of probate be satisfied that such person is insane, or if he has a reasonable doubt as to his sanity, he shall have the person or persons so bringing the alleged insane person before him to institute the inquisition proceedings of lunacy as is now provided by law."

This office has previously ruled in an opinion dated January 22, 1941, addressed to Honorable B. P. Singleton, Chief Examiner of Accounts, State Department of Finance, that a sheriff has the right to place an insane person in jail without first obtaining a mittimus where the circumstances are such as to prevent the immediate bringing of the matter to the attention of the judge of probate. In that opinion it was pointed out that in every instance, however, caution should be used so that the person is not held an unreasonable time before mittimus is obtained. See Quarterly Report of Attorney General, Vol. 22, page 41.

Therefore, it is my opinion that where a person has been found to be in need of care and treatment for his own or others' welfare as provided in Title 45, Sections 205, 208, and 210, Code of Alabama 1940, the judge of probate who made the investigation, upon reasonable proof, is authorized to issue a mittimus to the sheriff to take into custody such

person and transport him to an Alabama state hospital, even against the wishes of relatives,

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 26, 1963

Hon. Walter S. Houseal
Superintendent of Insurance
Administrative Building
C A P I T O L

Insurance — Taxation.

Premiums paid on risks reinsured by the State Insurance Fund are subject to gross premium tax.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion bearing date of March 11, 1963, is as follows:

“My question relates to a levy for premium tax upon insurance companies that reinsure a portion of the risk carried in the State Insurance Fund. The statute dealing with the State Insurance Fund in Title 28, Section 321, **Code of Alabama**, recompiled, 1958, states, ‘such risks as may be listed in the underwriting schedule showing amounts reinsured over and above amounts retained by the state insurance fund.’

“As a matter of fact, a portion of the risk insured by the State Insurance Fund is reinsured in a fire insurance company licensed to do business in Alabama. Rates on this reinsurance are approved by the Department of Insurance and premium and loss data is furnished to the appropriate statistical agency. Agents commissions are also paid on this insurance or reinsurance.

“Title 51, Section 816, states that ‘(a) Every foreign fire or marine insurance company shall pay a premium tax amounting to two and one-half dollars on each one hundred dollars — for business in this state.’ For the purposes of this act, premium is defined in

Title 51, Section 812(5) as follows: "The term "premiums" as used in the article shall include all amounts received in cash or otherwise on risks in this state as consideration for insurance contracts, less: (b) reinsurance premiums from companies authorized to do business in Alabama and subject to the premium tax provided for in this article.'

"I question whether this is 'reinsurance' in the sense that it is exempt from premium tax as specified in the code, since the State Insurance Fund is not a company authorized to do business in Alabama, nor has premium tax been paid on the primary insurance which this transaction reinsures.

"I would appreciate your opinion in this matter. If your opinion is that premium tax is due, how many years may I go back for collection where it was not paid."

Premiums charged and paid into the insurance fund are set out in Title 28, Section 321, Code of Alabama 1940, as amended, as follows:

"§ 321. Premiums, how charged and paid.—The net premium charged shall be based on the current commercial rate, less forty per cent discount, except on such risks as may be listed in the underwriting schedule showing amounts reinsured over and above amounts retained by the state insurance fund. No discount shall be allowed on or with respect to the amounts reinsured either with insurance companies or under a contingent reinsurance account which may be carried by the state insurance fund. The director of finance may, with the approval of the governor, purchase such reinsurance as may in the opinion of the director of finance, be necessary for the proper distribution of the risk. The director of finance shall collect such reinsurance upon any loss sustained and pay the same into the state insurance fund."

Amount of gross premium tax on foreign companies is set out in Title 51, Section 816, Code of Alabama 1940, as amended, and tax to be paid by domestic companies in Title 51, Section 819, Code of Alabama 1940, as amended.

The term "premiums" is defined in Title 51, Section 812(4), Code of Alabama 1940, as amended, as follows:

"(4) The term 'premiums,' as used in this article, shall include all amounts received in cash or otherwise on risks in this state as consideration for insurance contracts, less: (a) Insurance premiums returned, (b) reinsurance premiums from companies authorized to do business in Alabama and subject to the premium tax provided for

in this article, and (c) dividends paid, applied, or left with the company to accumulate at interest."

The above definition prevents double taxation. But in the situation now under discussion there has been no earlier payment of gross premium tax since the State Insurance Fund is not a company "authorized to do business in Alabama and subject to the premium tax provided for in this article."

Attention is directed to the fact that Title 28, Section 321, *supra*, provides that the insured gets no discount on any of the amounts reinsured with insurance companies either.

In my opinion, gross premium tax is due on such reinsurance premiums.

Title 51, Section 915, Code of Alabama 1940, as amended, provides that all such actions by the State shall be commenced within three years from the date of delinquency.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

March 27, 1963

Hon. Walter S. Houseal
Superintendent of Insurance
Administrative Building
C A P I T O L

Insurance — Mutual Aid — Associations — Limits on
Policies or Contracts.

Policies or contracts written under authority of Title 28, Section 273, Code of Alabama 1940, as amended, limited to each insured to one contract or policy of \$500.00 with or without double indemnity and one accidental death policy not to exceed \$1,000.00.

Opinion by Assistant Attorney General Clark.

Dear Sir:

Your request for an official opinion, bearing date of March 11, 1963, is as follows:

"Title 28, Section 273, Code of Alabama, recompiled, 1958, governing Mutual Aid Associations states in part—'Any such company or association may also write and issue contracts or policies with benefits payable in cash; provided, however, the gross benefit payable under each such contract shall not exceed five hundred dollars (\$500.00) except when a double indemnity policy is issued, in which case the benefits shall not exceed one thousand dollars (\$1000.00).'

"It has continually been the interpretation of the Department of Insurance that this wording intends that such mutual aid association is prohibited from writing a contract with benefits exceeding \$500.00 on any one person. Were the wording not interpreted in this manner there would be no ceiling on the number of contracts that could be written on any given individual. This is to say, that if they could write two contracts on a person, they could also write ten, twenty and so on.

"This would in effect put the Mutual Aid Associations into the 'Old Line' life insurance business, but on a lower capitalization and less stringent reserve basis.

"A situation has arisen wherein the policy of the Department of Insurance has been questioned with respect to its interpretation of the code concerning the aforementioned matter. I would appreciate an opinion from you on this."

In answering your question, the type of insurance written, capital stock required and deposit by such company should be first considered.

Such companies are defined in Title 28, Section 259, Code of Alabama 1940, as follows:

"All companies or associations, except non-profit corporations for establishment of hospitalization plans, whether voluntary or incorporated under the laws of this or any other state, doing in this state a business limited to the issuing of certificates or policies to or agreeing with their members or policyholders upon the birth or death of any child, upon marriage, death, sickness, or upon any physical disability of such member or policyholder, to pay money or render aid, including burial benefits or the furnishing of complete funerals to him or to others dependent upon him, or

beneficiary designated by him, which money or aid is derived from donations, fees, dues, assessments or premiums, are hereby declared to be mutual aid, benefit or industrial companies or associations."

Capital stock of a mutual aid association is set out in Title 28, Section 246, Code of Alabama 1940, as amended, as follows:

"§ 246. Capital stock. (A) No such corporation shall be organized with a capital stock of less than twenty-five thousand dollars, nor shall any such corporation be organized or commence business unless it has received not less than the sum of twenty-five thousand dollars in payment in cash for subscriptions to its capital stock. Nothing contained in this article shall be construed to require any corporation already organized, under the laws of the state, as a mutual aid, benefit, or industrial company or association to increase its capital stock in the manner indicated. (B) No mutual aid, benefit, or industrial company or association heretofore lawfully organized under the laws of this state, with a capital stock of less than the sum of twenty-five thousand dollars, shall be denied a permit to do business in this state, if any managing officer of such corporation became engaged in or was called upon to render military services to the United States and thereafter, and as the result thereof, such corporation temporarily suspended operations; and provided further that said corporation shall have paid all franchise and other lawful taxes due the state of Alabama."

It will be further noted that the amount of statutory deposit as required by Title 28, Section 263, Code of Alabama 1940, cannot be less than three thousand dollars but need not exceed one hundred thousand dollars even if gross premiums receipts are a million dollars or more annually.

Comparing this with the one hundred thousand dollar statutory deposit required of "old line" life insurance companies, it can be seen that mutual aid companies were designed for the conduct of smaller companies writing the industrial type of insurance anticipating smaller policies and possibly weekly debits.

Title 28, Section 273, Code of Alabama 1940, as amended, provides as follows:

"§ 273. Contracts or policies which may be written.—Any such company or association may also write and issue contracts or policies with benefits payable in cash; provided, however, the gross benefit payable under each such contract shall not exceed five hundred dollars (\$500.00) except when a double indemnity

policy is issued, in which case the benefits shall not exceed one thousand dollars (\$1,000.00). Any such company or association in addition to the above may also write and issue contracts or policies covering accidental death, the gross benefits payable under such accidental death policies shall not exceed one thousand dollars (\$1,000). Such benefits under the accidental death policies may be payable in cash. The superintendent of insurance shall also each year compute the net value as of the thirty-first day of December of the preceding year, of all such outstanding contracts or policies of each such company or association upon the basis of the 'combined experience' or 'actuaries' table' or 'the American experience table' rate of mortality (Illinois Standard of valuation), with interest at the rate of four per cent per annum, and the aggregate net value so ascertained of such contracts or policies of any such company or association shall be deemed its liability on account of said contract or policy obligations, other than accrued claims. Each such company or association so issuing contracts or policies with benefits payable in cash must, in addition to holding and maintaining the assets hereinbefore in section 265 of this title required, hold and maintain cash or bonds of the United States Government or of the State of Alabama, or of any subdivision thereof, or first mortgage on real estate securing indebtedness not in excess of fifty percent of the value thereof, in an amount equal to the aggregate net value of all such outstanding contracts or policies. Whenever any such foreign company or association issuing contracts or policies in this state with benefits payable in cash, shall present to the superintendent of insurance of this state a certificate from the superintendent of insurance or like officer of another state, as to the value of such contracts or policies in force in this state, the superintendent of insurance of this state shall be allowed to accept such valuation in lieu of his own valuation, which valuation shall be according to the standard fixed in this section. The superintendent of insurance shall allow to the credit of any such foreign company or association, issuing contracts or policies in this state, with benefits payable in cash, in the amount of its financial condition, such assets as are or can be made available for the payment of losses in Alabama. He shall not allow stockholders' obligations of any description as part of the assets or capital of any such company or association so issuing contracts or policies in this state, with benefits payable in cash, unless the same are secured by collateral satisfactory to the superintendent of insurance."

Had the Legislature intended to authorize policies of \$1,000.00, \$5,000.00, or \$10,000.00, or more to a person, this could have been done.

It is further noted that the 1947 Amendment to Section 273, *supra*, inserted the provision as to double indemnity policies and the 1953 Amendment added the accidental death policy not to exceed \$1,000.00.

This indicates a limit on benefits was intended by the Legislature. It is not logical that the Legislature would have spelled out the limits of coverage if a person could secure twice as much coverage by merely taking out two policies instead of one.

Due to lower capitalization and less required reserve, selling of a number of such contracts or policies each to numbers of people could result in an impairment of such mutual aid association with a possibility of receivership and loss to that group of people least able to stand such a loss.

In my opinion, the intent of Section 273, supra, is to limit the sales of such policies or contracts issued to one person to one contract of \$500.00 with or without double indemnity and one accidental death policy with benefits not to exceed \$1,000.00. If such mutual aid associations feel that increased coverage is warranted, this is a matter which may be changed by legislation.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

March 28, 1963

Honorable Howard L. Mosley
Administrator
Barbour County Hospital
Eufaula, Alabama

Compensation — Employment, Employers and Employees
— Hospitals.

County and public hospital associations are authorized to enter into contracts of employment with salaried employees whereby such employees may be compensated for work performed during authorized vacation time over and above that prescribed in the contract of employment.

Opinion by Assistant Attorney General Webb.

Dear Sir:

I have received your request for my official opinion dated March 20, 1963, which reads, in pertinent part, as follows:

"In the audit report of his hospital for Fiscal Year 1961, the following finds and recommendations appeared:

"On the payroll for June 15, 1961, a total of \$577.53 was paid to a few employees for unused vacation. The Administrator's reason for this was that these employees and himself are indispensable to the operation of the hospital... "No monetary exceptions were taken to the above cited instance due to the widespread misunderstanding among hospital boards throughout the state regarding payment for unused vacation and bonuses, however the Chairman of the Board and the Administrator were notified that such payments are illegal, and were advised that any such payments in the future be charged against those responsible.

"**Recommendation:** The practice of paying for unused vacation be discontinued.'

"Opinion is hereby requested as to the legality of paying key employees of Hill-Burton hospitals for unused annual vacation, when such payment is in the essential interest of such hospitals."

In my opinion, the answer to your letter is dependent upon the conditions of employment under and by which the employees concerned are engaged by your hospital.

I have been informed by the Secretary of State that the Barbour County Hospital is organized under the provisions of Act No. 211, General Acts of 1945, page 330. Funds appropriated under the provisions of this act are restricted for the purpose of establishment, maintenance and operation, as well as construction, of a public hospital. Pursuant to the authority of a hospital association or county hospital organized under this and similar acts, this office has generally recognized the fact that the hospital must have broad contractual powers in the employment of salaried employees so long as the provisions of such employment do not violate the provisions of the Constitution of Alabama. In this regard, your attention is invited specifically to the provisions of Section 94 of the Constitution of Alabama 1901. This section prohibits the use of public funds for any expenditure constituting gifts or the lending of aid and credit to private individuals.

This office has previously held that county governing bodies are authorized to enter into contracts of employment with salaried employees whereby such employees may be compensated for overtime work performed and, in my opinion, when an employee is required to work during his vacation time and such work is over and above that which is prescribed in his contract of employment in that the

vacation time is lost, additional compensation might also be authorized if the same is provided in the contract of employment. In this regard, your attention is invited to the holding of this office reported in Quarterly Report of Attorney General, Volume 103, page 27, which reads, in pertinent part, as follows:

"To do so, however, I feel that the county governing body should enter into specific contracts of employment to this effect, spelling out the conditions of such employment and the provisions as to compensation for any overtime performed. I feel, too, that such conditions of employment should be uniform and equally applicable to all employees within any given group or classification. If this be done, I would feel that the county governing body would be authorized to pay to these employees such compensation as they might earn by reason of overtime services.

"As I have noted, if one of the conditions of employment is that such employees will be compensated for services performed over and above a given standard, the county would then be authorized to make payment for any services so rendered under this contract."

It is, therefore, my opinion that county and public hospital associations are authorized to enter into such contracts of employment with their salaried employees whereby such employees may be compensated for work performed during authorized vacation time over and above that prescribed in the contract of employment. I am further of the opinion that such conditions of employment should be uniform and equally applicable to all employees within any given group or classification.

Very truly yours,

RICHMOND M. FLOWERS
Attorney General

March 28, 1963

Honorable V. H. Robinson, Attorney
Montgomery County Board of Education
36 South Perry Street
Montgomery 4, Alabama

Schools — Counties — Montgomery County — Funds

Funds appropriated by the County Board of Revenue of Montgomery County to the County Board of Education of Montgomery County for the purpose of assisting in the cost of construction of a vocational training center for handicapped children and adults at the Central Alabama Rehabilitation Center, a part of the Alabama Society for Crippled Children and Adults, Inc., may be so used and turned over by said Board of Education to said Rehabilitation Center.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion bearing date of March 25, 1963 is as follows:

"The Board of Education of Montgomery County, Alabama, is desirous of having your office render an opinion on the following matter.

"The Board of Revenue of Montgomery County, Alabama, proposes to appropriate the sum of \$6,000.00 for the specific purpose of assisting in the cost of the construction of a Vocational Training Center for Handicapped Children and Adults in the Central Alabama Rehabilitation Center of Montgomery which is a part of the Alabama Society for Crippled Children and Adults, Inc. This Vocational Training Center will serve to help educate the handicapped.

"The Board of Revenue of Montgomery County, Alabama, proposes to pay the said sum of \$6,000.00 to the Board of Education of Montgomery County, Alabama, for disbursement by the Board of Education of Montgomery County, Alabama, to the Central Alabama Rehabilitation Center toward the construction of the Vocational Training Center for Handicapped Children and Adults. "The specific question submitted to your office for an official ruling is: May the Board of Education of Montgomery County, Alabama, by and under authority of Act 222, 1939 Local Acts of

Alabama, Page 125, pay this said sum of \$6,000.00 directly to the Central Alabama Rehabilitation Center toward the construction cost of the Vocational Training Center for Handicapped Children and Adults, the title to which Vocational Training Center for Handicapped Children and Adults will be in the Alabama Society for Crippled Children and Adults, Inc.?

"If the Board of Education cannot pay this money directly to the Central Alabama Rehabilitation Center for the construction of a Vocational Training Center for Handicapped Children and Adults, please direct us how the Montgomery County Board of Education may pay said sum toward the construction of the said Vocational Training Center when said sum is received from the Board of Revenue of Montgomery County, Alabama?"

I am of the opinion that your first inquiry should be answered in the affirmative.

Act No. 222, Local Acts of Alabama 1939, page 125, established the County Board of Education in and for Montgomery County. All rights, privileges, authority, and powers now and heretofore vested by law in any city or county board of education within said county were transferred to this County Board of Education.

Title 52, Section 207, Code of Alabama Recompiled 1958, as amended by Acts 1959, Second Extra Session, page 196 (1961 Cumulative Pocket Part) provides as follows:

"§ 207. **Appropriation of funds out of county treasury.** — The courts of county commissioners or boards of revenue of the several counties of Alabama are authorized at any meeting of said court in any calendar year to appropriate any funds they may deem proper and expedient out of the general funds of the county treasury for the construction, repair, operation, maintenance and support of new or existing public schools within said county."

I am informed that the Central Alabama Rehabilitation Center, which is part of the Alabama Society for Crippled Children and Adults, Inc., operates with the approval and sanction of, and in cooperation with, the Alabama State Crippled Children's Service, an agency of the State Board of Education. — See letter of this office to Honorable Frank R. Stewart, State Superintendent of Education, dated June 18, 1959.

This office in the opinion reported in Quarterly Report of Attorney General, Volume 74, page 54, addressed to Honorable W. J.

Terry, State Superintendent of Education, under date of February 26, 1954, held in effect that such schools as the one under consideration have become a part of the public school system of Alabama.— See joint letter of this office to Honorable V. H. Robinson, Attorney, Montgomery County Board of Education and Honorable John P. Kohn, Attorney, Montgomery County Board of Revenue, under date of April 15, 1960. In said letter it was held that the Montgomery County Board of Education may turn over certain funds appropriated to it by the Board of Revenue of Montgomery County to the Montgomery County Spastic Children's School for its use.

In view of the foregoing, it is my opinion that the money appropriated by the County Board of Revenue of Montgomery County to the County Board of Education of Montgomery County for the specific purposes stated in your inquiry may be so used, and be turned over to the Central Alabama Rehabilitation Center, a part of the Alabama Society for Crippled Children and Adults, Inc., to assist in the cost of construction of the Vocational Training Center in question.

The answer to your first inquiry obviates the necessity of answering your second inquiry.

Yours very truly,

RICHMOND M. FLOWERS
Attorney General

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